Index.

Page

Statement of Facts 1

A. Nature of case as pleaded 1

B. Nature of case as proved 4

Assignment of Errors 22

The decree erroneously permits

1. The impairment of complainant's contract (i. e. its franchise) 23
2. The deprivation of complainant's property without due process of law 23
3. The "taking" of complainant's property without compensation being *"first"* paid 23
4. The "damaging" of complainant's property without compensation being *"first"* paid 23
5. The construction of a *new* public utility by the city without any attempt by the city to purchase the complainant's system as required by Section 2, Article XII of the San Francisco Charter 23

Argument 23

I. The complainant's franchise constitutes an irrevocable contract, the obligation of which will be impaired by the proposed municipal action 23

A. The complainant's franchise is an irrevocable contract .. 23

B. The complainant's franchise vested the complainant with an easement or right-of-way in the streets covered by the franchise, which easement or right-of-way is "property" under the protection of the constitutional guaranties 25

C. The franchise of the complainant secured to the complainant a right of reasonably safe and convenient access to its cars which right could not be destroyed or substantially impaired without impairing the obligation of the franchise 29

D. The operation of the municipal cars in the manner proposed will impair the obligation of the complainant's franchise 32

E. The complainant's franchise is an exclusive one as we shall later show and for this additional reason the ordinances complained of impair the obligation of complainant's franchise. 42

Page

II. The proposed municipal action will (a) "deprive" the complainant of its property without due process of law contrary to the Constitution of the United States, and (b) "take" the property of the complainant without just compensation, contrary to the Constitution of California 43

A. The complainant's franchise is exclusive and for this reason the proposed municipal action involves a taking of complainant's property contrary to the constitutional guaranties 44

B. The operation of the municipal cars on tracks parallel to those of the complainant will, by preventing access to the complainant's cars, violate the constitutional guaranty against the "taking" of property without regard to whether complainant's franchise is exclusive or not 45

III. The proposed municipal action will "damage" the property of the complainant without "just compensation having first been made" as required by the Constitution of California ... 52

A. The constitutional provision guaranteeing immunity of private property from "damage" except upon payment of compensation was intended to create a right in private property which did not previously exist ... 52

B. The loss of patronage that will result to the complainant through the difficulty and danger of access to its cars by reason of the operation of the city's cars on municipal tracks between the complainant's tracks and the sidewalk is directly within the constitutional prohibition against "damaging" property without compensation "first" paid 60

IV. The complainant's franchise is exclusive for all exceeding five blocks on any street included in its franchise and the operation of municipal cars for more than five blocks on any such street will violate complainant's franchise 77

A. The franchise of the complainant, by express provision, prohibits the city from operating a railroad for more than five blocks on any street covered by the complainant's franchise 77

B. The provisions of Section 499 of the Civil Code, as that section existed in 1879 entered into and became a part of the complainant's franchise insuring to the complainant an exclusive franchise for all exceeding five blocks 80

V. The plans of the municipality for crossing the tracks of the complainant without first making compensation involve an impairment of the grant contained in the franchise and give rise to both a "taking" and a "damaging" of property without just compensation 84

Page

A. The crossing of the complainant's tracks by the municipal tracks without payment of compensation will deprive the complainant of property by appropriating *pro tanto* the easement of the complainant in the portion of the street between its tracks 84

B. The damage which will result from a crossing of the complainant's tracks by municipal tracks and the operation of municipal cars across the complainant's tracks constitute such "damage" as under the Constitution of California must be paid to the complainant 87

VI. The municipality has not solicited and considered offers for the sale to the city and county of the lines of the complainant and has, therefore, not complied with the provisions of Section 2 of Article XII of the charter, compliance with which is a condition precedent to the acquisition of a public utility 90

VII. The claim of the defendants that the complainant's franchise from its inception was subject to impairment and damage by the operation of a second railroad which would prevent access to the complainant's cars is untenable 97

A. The city has no reserved right to operate its cars in such manner as to cut off or impair access to the complainant's cars 98

B. If right of access to property is cut off or materially impaired, it is immaterial that the public work which causes it is such as does not involve the imposition of a new servitude upon the street 101

C. The city cannot, under the police power, justify its manner of competition so as to destroy the complainant's right to compensation for the damage so inflicted upon its franchise 104

VIII. The arguments of the defendants in support of their contention that the complainant's franchise is not exclusive for all in excess of five blocks are untenable and find no support in the authorities upon which the defendants rely 112

A. Section 499 of the Civil Code was not a mere limitation upon the powers of the Supervisors in respect of granting street railway franchises. It was intended to secure to a franchise holder an exclusive right for all exceeding five blocks upon any street covered by the franchise 113

B. The provision of Section 499 of the Civil Code prohibiting the occupation and use of the same street by two railroad corporations for more than five blocks was not a mere police regulation enacted solely in the interest of the public and incapable of entering into the obligation of the complainant's franchise 120

Page

C. The right of the complainant to exclude a second street railroad from the streets occupied by it under its franchise, was a right of which the complainant could not be deprived under the reserved power of the State to alter, repeal, or amend corporate charters.... 128

D. The City of San Francisco is bound by the provisions of Section 499 as they existed in 1879, in like manner and to the same extent as a private corporation operating a street railroad..... 131

1. The evil at which the prohibition of Section 499 of the Civil Code was directed was not dependent upon who owned the railroad. A municipally owned railroad is as much within the purpose of the statute as one owned by a private corporation 132

2. A city when operating a street railroad or other public utility is not performing any governmental function 136

3. A general law of the State dealing with "corporations" operating public utilities is binding upon a municipal corporation which operates such a utility 143

4. The cases relied upon by defendants in support of their contention that the term "railroad corporations" in Section 499 of the Civil Code do not include a municipal corporation operating a railroad are readily distinguishable..... 148

IX. It is not true as contended by the defendants that the Civil Code of California permits one street railway to cross the tracks of another street railway without making compensation therefor and it has never been so held in California.... 155

A. The arguments of the defendant in respect of the construction of Sections 469 and 500 of the Civil Code are unsound..... 155

B. Neither of the cases relied upon by the defendants to support their claim that Section 469 of the Civil Code does not require a street railroad to make compensation to another street railroad when it crosses the latter's tracks so decides, nor was such a question involved in either of the cases..... 157

X. Conclusion 161

Appendix.

Page

Cal. Civ. Code in effect January 1, 1873 iii
Cal. Civ. Code, sec. 497 as originally enacted iii
Cal. Civ. Code, sec. 497 as amended March 3, 1876 iv
Cal. Civ. Code, sec. 497 as amended February 25, 1891 iv
Cal. Civ. Code, sec. 499 as originally enacted iv
Cal. Civ. Code, sec. 499 as amended February 25, 1891 v
Cal. Civ. Code, sec. 499 as amended March 21, 1907 v
Cal. Civ. Code, sec. 499 as amended April 24, 1911 vii
Cal. Civ. Code, sec. 500 v
Cal. Const. of 1879, Art. XI, sec. 19 as amended October 10, 1911 xi
Cal. Pol. Code, sec. 4408, in effect January 1, 1873 vii
Charter of San Francisco adopted January 26, 1899 in effect January 8, 1900 viii
Charter of San Francisco, Art. XII as originally enacted ix
Charter of San Francisco, Art. XII, secs. 1 and 2 as amended February 5, 1903 x
Charter of San Francisco, Chapter XXII, sec. 1, sub. 27 as originally enacted viii
Charter of San Francisco, Chapter XXII, sec. 1, sub. 27 as amended February 5, 1903 viii

Statute March 28, 1870 i
Statute April 4, 1870 amending sec. 1 of Act of March 28, 1870 ii
Statute March 23, 1872 amending sec. 1 of Act of March 28, 1870 ii

List of Cases Cited.

Pages

Adams v. Railway Co. (1888), 39 Minn. 286; 39 N. W. 629 57
Adams v. Tyler (1876), 121 Mass. 380 134
Africa v. Mayor (1895, C. C. E. D. Tenn.), 70 Fed. 729 24
Allentown Turnpike Co. v. Lehigh Valley Traction Co. (1896), 174 Pa. St. 273; 34 Atl. 565 66
Appeal of the North Beach & Mission R. R. Co. (1867), 32 Cal. 500 25
Asher v. Independence (1914), 177 Mo. App. 1; 163 S. W. 574 141
Athens v. Miller (1914), 190 Ala. 82; 66 So. 702 141

Bank of the United States v. Planters Bank (1824), 9 Wheat. 904; 6 L. ed. 244 145
Bank of United States v. M'Kenzie (1829), 2 Brock. 393; 2 Fed. Cas. 718 .. 145
Belleville v. Turnpike Co. (1908), 234 Ill. 428; 84 N. E. 1049 ....29, 46, 106, 126
Bigelow v. Ballerino (1886), 111 Cal. 559; 44 Pac. 307 31
Birmingham Traction Co. v. Birmingham Ry. Co. (1898), 119 Ala. 129; 24 So. 568 .....28, 85, 89
Blair v. Chicago (1906), 201 U. S. 400; 50 L. ed. 801 82
Block v. Salt Lake Co. (1893), 9 Utah 31; 33 Pac. 229 58
Board of Rapid Transit Commissioners, in re (1908), 112, N. Y. Supp. 619; 128 App. Div. 103 .....133, 135
Board of Rapid Transit Commissioners, In re (1909), 197 N. Y. 81; 90 N. E. 456 .....136, 139, 148
Boise Water Co. v. Boise City (1913), 230 U. S. 84; 57 L. ed. 1409 24
Boyd v. United States (1885), 116 U. S. 616; 29 L. ed 746 54
Bray v. Wallingford (1850), 20 Conn. 416 134
Brewster v. Kitchell, 1 Salk. 198; 91 Eng. Rep. 177; 1 Lord Raymond 317; 91 Eng. Rep. 1108 79
Brown v. Trustees (1902), 224 Ill. 184; 79 N. E. 579 146
Brumm, Appeal of (1888), Pa. 12 Atl. 855 141
Butler v. Ashworth (1894), 102 Cal. 663; 36 Pac. 922 62

Cable Tramway Co. v. Omaha Horse Co. (1891), 140 U. S. 692; 35 L. ed. 600 72
Calloway v. Cossart (1885), 45 Ark. 81 143
Camden Ry. Co. v. Stein (1906), 30 Ky. L. 140; 97 S. W. 394 57
Cederberg v. Robison (1893), 100 Cal. 93; 34 Pac. 625 62
Central City Railway Co. v. Fort Clark Railway Co. (1876), 81 Ill. 523 .. 41
Central Trust Co. v. Hennen (1898, C. C. A. 6th), 90 Fed. 593 48
Chafor v. Long Beach (1917), 174 Cal. 478; 163 Pac. 670 138
Chenango Bridge Co. v. Binghamton Bridge Co. (1886), 3 Wall. 51; 18 L. ed. 137 .....43, 118
Chicago Co. v. Chicago (1897), 166 U. S. 226; 41 L. ed. 979 44
Chicago v. O'Brien (1884), 111 Ill. 532 111
Chicago v. Selz (1902), 104 Ill. App. 376 141
Chicago v. Taylor (1887), 125 U. S. 98; 31 L. ed. 638 ..... 53, 76

Pages

Chicago, Milwaukee & St. Paul R. R. Co. v. Wisconsin (1915), 238 U. S. 491; 59 L. ed. 1423 131
Chicago R. R. Co. v. Chicago & St. Louis R. R. Co. (1884), 15 Ill. App. 587 ..... 28, 85, 89
Chicago R. R. Co. v. Englewood Ry Co. (1886), 115 Ill. 375 ..... 28, 87
Citizens R. Co. v. City Ry. Co. (1893, C. C. Ind.), 56 Fed. 746 24
City Ry. Co. v. Citizens' Street R. Co. (1897), 166 U. S. 557; 41 L. ed. 1114 ..... 36, 121
Cleveland Ry. Co. v. Cleveland (1899, C. C. N. D. Ohio), 94 Fed. 385 24
Cleveland v. Cleveland Ry. Co. (1903), 194 U. S. 517; 48 L. ed. 1102 24
Coats v. Atchison Ry. Co. (1905), 1 Cal. App. 441; 82 Pac. 640 ..... 31, 56
Cochise County v. Ritter (1890), 3 Ariz. 208; 73 Pac. 448 82
Commissioners v. King (1869), 13 Fla. 451 81
Commonwealth v. Temple (1859, per Shaw, C. J.), 14 Gray 69 30
Crawford v. Marion (1910), 154 N. C. 73; 69 S. E. 763 58
Creighton v. Pragg (1862), 21 Cal. 115 82
Cushing-Wetmore Co. v. Gray (1907), 152 Cal. 118; 92 Pac. 70 ..... 31, 56

Dana v. Rock Creek Company (1896), 7 App. Cas. D. C. 482 48
Denver v. New York Trust Co. (1913), 229 U. S. 123; 57 L. ed. 1101 81
Detroit v. Detroit Road Co. (1880), 43 Mich. 140; 5 N. W. 275 129

Eachus v. Los Angeles Ry. Co. (1894), 103 Cal. 614; 37 Pac. 750 ... 30, 53, 56, 103
Eastern Illinois State Normal School v. Charleston (1916), 271 Ill. 602; 111 N. E. 573 141
Eastern Extension Co. v. United States (1913), 231 U. S. 326; 58 L. ed. 250 133
Eaton v. Weiser (1906), 12 Idaho 544; 86 Pac. 541 141
Elizabeth v. Banks (1909), 150 N. C. 407; 64 S. E. 189 74

Fairchild v. Oakland Ry. Co. (1917, Cal. Sup. Ct.), 169 Pac. 388 .. 31, 53, 56, 103
Farrington v. Tennessee (1877), 95 U. S. 679; 24 L. ed. 558 119
Ferris v. Pett (1919 R. I.), 105 Atl. 369 41
Fidelity Trust Co. v. Mobile St. R. Co. (1892, C. C. S. D. Ala.), 53 Fed. 687 36
Fletcher v. Peck (1810), 6 Cranch. 87; 3 L. ed. 162 24
Ford v. Santa Cruz R. R. Co. (1881), 59 Cal. 290 ..... 31, 56
Foster Lumber Co. v. Arkansas Ry. Co. (1908), 20 Okla. 583; 95 Pac. 224 ..... 49, 58, 104
Foudry v. St. Louis R. Co. (1908), 130 Mo. App. 104; 109 S. W. 80 ..... 57, 65

Georgia R. Co. v. Columbus Co. (1892), 89 Ga. 205; 15 S. E. 305 ..... 84, 89
Gillespie v. South Omaha (1907), 79 Neb. 441; 112 N. W. 582 ..... 57, 111
Governor v. Woodworth (1872), 63 Ill. 254 144
Grand Trunk Ry. Co. v. South Bend (1913), 227 U. S. 544; 57 L. ed. 633 .. 24, 121
Guffey v. Smith (1915), 237 U. S. 101; 59 L. ed. 856 31
Gulf Railroad Co. v. Hewes (1901), 183 U. S. 66; 46 L. ed. 86 29

Pages

Hamilton Traction Co. v. Hamilton Transit Co. (1904), 69 Ohio St. 402; 69 N. E. 991 ..... 27, 37, 45
Hilton v. Hilton (1918 N. J.), 104 Atl. 375 41
Ho Ah Kow v. Noonan (1890 C. C. Cal.), 12 Fed. Cas. 252 62
Hollingsworth v. Tensas (1883 C. C. W. D. La.), 17 Fed. 109 112
Hot Springs Ry Co. v. Williamson (1885), 45 Ark. 429 53
Hot Springs Co. v. Hot Springs (1902), 70 Ark. 300; 67 S. W. 761 37

Idaho R. Co. v. Nagle (1911, C. C. A. 9th), 184 Fed. 598 58
Illinois Central R. Co. v. Moriarity (1916), 135 Tenn. 446; 186 S. W. 1053 112
Interurban Ry. Co. v. Public Utilities Commission (1918, Ohio); 120 N. E. 831 ..... 25, 126
Iowa Telephone Co. v. Keokuk (1915 S. D. Ia. E. D.), 226 Fed. 82 131
Iron City Co. v. Pittsburg (1916), 253 Pa. 478; 98 Atl. 679 ..... 58, 65

Jaynes v. Omaha Ry Co. (1898), 53 Neb. 631; 74 N. W. 67 ..... 57, 103
Joplin v. Southwest Missouri Light Co. (1903), 191 U. S. 150; 48 L. ed. 127 150

Keever v. Mankato (1910), 113 Minn. 55; 129 N. W. 158 ..... 134, 148
Knoxville Water Co. v. Knoxville (1906), 200 U. S. 22; 50 L. ed. 353 ..... 79, 83, 149, 150

Lake Erie R. Co. v. Scott (1890), 132 Ill. 429; 24 N. E. 78 ..... 57, 75, 76
Lake Shore Ry. Co. v. Chicago R. Co. (1881), 100 Ill. 21 ..... 28, 87
Lake Shore Ry v. Cincinnati Ry. (1876), 30 Ohio St. 604 28
Lamm v. Railway Co. (1890), 45 Minn. 71; 47 N. W. 455 57
Longenecker v. Wichita Light Co. (1909), 80 Kan. 413; 102 Pac. 492 57
Los Angeles v. Allen (1917), 32 Cal. App. 533; 163 Pac. 697 73
Los Angeles v. Zeller, (1917, Cal. Sup. Ct.), 167 Pac. 849 73
Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal. S. D.), 241 Fed. 912 ..... 34, 41, 55, 108, 138
Los Angeles Co. v. Hubbard (1911), 17 Cal. App. 646; 121 Pac. 306 26
Los Angeles Railway Co. v. Los Angeles (1907), 152 Cal. 242; 92 Pac. 490 81
Louisville Trust Co. v. Louisville Ry Co. (1899), 174 U. S. 674; 43 L. ed. 1130 62

Madera Water Works v. Madera (1913), 228 U. S. 454; 57 L. ed. 915 149
Market St. Ry. Co. v. Central Ry Co. (1877), 51 Cal. 583 158
Market St. Ry Co. v. Hellman (1895), 109 Cal. 571; 42 Pac. 225 129
Mason v. Harper's Ferry Bridge Co. (1879), 17 W. Va. 396 43
Mason City R. Co. v. Wolf (1906, C. C. A. 8th), 148 Fed. 961 ..... 76, 102
Mayor v. Bailey (1845), 2 Den. 433 141
Mayor v. Henderson (1913), 12 Ga. App. 120; 76 S. E. 1034 57
Mayor v. Wing (1901), 113 Ga. 90; 38 S. E. 392 56
Memphis R. Co. v. Birmingham Ry Co. (1892), 96 Ala. 571; 11 So. 642 ..28, 86, 89
Mercantile Trust Co. v. Collins Park R. Co. (1900 C. C. N. D. Ga.), 101 Fed. 347 24

Pages

Metropolitan R. R. Co. *v.* District of Columbia (1889), 132 U. S. 1; 33 L. ed. 231 ..... 147, 154
Meyer *v.* Richmond (1898), 172 U. S. 82; 43 L. ed. 374 51
Missouri Pac. Ry. Co. *v.* Porter (1892), 112 Mo. 361; 20 S. W. 568 57
Mobile R. Co. *v.* Louisville R. Co. (1915), 192 Ala. 136; 68 So. 905 ..... 28, 89
Monett Co. *v.* Monett (1911 C. C. Mo.), 186 Fed. 360 43
Moore *v.* New Orleans Water Works Co. (1902, C. C. E. D. La.), 114 Fed. 380 ..... 34, 55
Morris *v.* Covington, (1919 Miss.), 80 So. 337 57
McPhee *v.* Union Pacific R. R. Co. (1907 C. C. A. 8th), 158 Fed. 5 74
McQuaid *v.* Portland Ry Co. (1889), 18 Ore. 237; 22 Pac. 899 58

Newark *v.* Funk (1864), 15 Ohio St. 462 134
Newburyport Water Co. *v.* Newburyport (1900 C. C. Mass.), 103 Fed. 584 44
Newington Local Board *v.* Cottingham (1879), L. R. 12 Ch. Div. 725 79
New Orleans Gaslight Co. *v.* Louisiana Light Co. (1885), 115 U. S. 650; 29 L. ed. 516 123
New Orleans Water Works Co. *v.* Rivers (1885), 115 U. S. 674; 29 L. ed. 525 125
New Orleans Water Works Co. *v.* St. Tammany Water Works Co. (1882, C. C. E. D. La.), 14 Fed. 194 ..... 43, 123
Ninth Avenue R. R. Co. *v.* N. Y. Elevated R. R. Co. (1877), 3 Abb. New Cas. 347 32
Norwood *v.* Baker (1898), 172 U. S. 269; 43 L. ed. 443 44

Oakland Railroad Co. *v.* Oakland-Brooklyn Railroad Co. (1873), 45 Cal. 365 116
Ogden *v.* New York (1910), 126 N. Y. S. 189 139
Omaha *v.* Kramer (1889), 25 Neb. 489; 41 N. W. 295 ..... 57, 59, 75
Omaha Horse Ry. Co. *v.* Cable Tramway Co. (1887, C. C. Neb.), 30 Fed. 324 ..... 51, 68, 69, 89
Omaha Horse Ry. Co. *v.* Cable Tramway Co. (1887, C. C. Neb.), 32 Fed. 727 ..... 69, 70, 74, 89, 100
Omaha Horse Ry. Co. *v.* Cable Tramway Co. (1888, C. C. Neb.), 33 Fed. 689 72
Omaha Horse Ry. Co. *v.* Cable Tramway Co. (1891), 140 U. S. 674; 35 L. ed. 600 72
Omaha Water Co. *v.* Omaha (1906, C. C. A. 8th), 147 Fed. 1 140
Owensboro *v.* Cumberland Tel. Co. (1913), 230 U. S. 58; 57 L. ed. 1389 ... 111, 130
O'Sullivan *v.* Griffith (1908), 153 Cal. 502; 95 Pac. 873 27

Pacific Ry Co. *v.* Wade (1891), 91 Cal. 449; 27 Pac. 768 ..... 158, 159
Pacific Telephone Co. *v.* Eshleman (1913), 166 Cal. 640; 137 Pac. 1119 .... 46, 70, 105, 162

Partridge *v.* Richmond (1918, Cal. App. Ct.), 172 Pac. 166 ..... 31, 56
Pennsylvania R. Co. *v.* Walsh (1889), 124 Pa. 544; 17 Atl. 186 ..... 58, 65
People *v.* Crane (1914), 150 N. Y. S. 933 139
People *v.* Mealy (1918, New York), 120 N. E. 155 24
People *v.* O'Brien (1888), 111 N. Y. 1; 18 N. E. 692 24

Pages

People v. Rich (1879), 54 Cal. 74; 116
Peoria Ry. Co. v. Peoria Terminal Co. (1911), 252 Ill. 73; 96 N. E. 689.. 27
Piatt v. Covington Bridge Co. (1871), 71 Ky. 31..... 33
Pickett v. United States (1910), 216 U. S. 546; 54 L. ed. 566..... 133
Pittsburgh Ry Co. v. Vance (1887), 115 Pa. St. 325; 8 Atl. 764..... 58, 64
Pocatello v. Murray (1912), 21 Idaho 180; 120 Pac. 812 82
Presbyterian Church v. New York (1826), 5 Cow. 538..... 80
Pumpelly v. Green Bay Co. (1871), 13 Wall. 166; 20 L. ed. 557..... 49, 50

Quinby v. Cleveland (1911 C. C. N. D. Ohio), 191 Fed. 68..... 58

Railroad Tax Cases (1882 C. C. Cal., Field, J.), 13 Fed. 722..... 129
Rains v. Oshkosh (1861), 14 Wis. 403..... 144
Reardon v. San Francisco (1885), 66 Cal. 492; 6 Pac. 317 53
Rigney v. Chicago (1882), 102 Ill. 64..... 53
Robinson v. Springfield Ry. Co. (1910), 143 Mo. App. 270; 126 S. W. 994 57
Russell, Matter of (1912), 163 Cal. 668; 126 Pac. 875..... 27
Russell v. Sebastian (1914), 233 U. S. 195; 58 L. ed. 912.....24, 149, 154
Rutland Light Co. v. Marble City Light Co. (1893), 65 Vt. 377; 26 Atl. 635 33

Sanitary District v. Chicago R. Co. (1915), 267 Ill. 252; 108 N. E. 312... 111
San Mateo Water Works v. Sharpstein (1875), 50 Cal. 284.....70, 162
San Pedro v. Southern Pacific R. R. Co. (1894), 101 Cal. 333; 35 Pac. 993 39
Santa Clara v. Southern Pacific Co. (1883 C. C. Cal,, per Field, J.), 18 Fed. 385 129
Seattle v. Stirrat (1909), 55 Wash. 560; 104 Pac. 834..... 139
Shipton Arbitration (1915), L. R. 3 K. B. 676..... 80
Slaughter v. Meridian Light Co. (1909), 95 Miss. 231; 48 So. 1040.....57, 103
Smith v. Southern Pacific R. R. Co. (1905), 146 Cal. 164; 79 Pac. 868..31, 56, 103
Snidow v. Board of Supervisors (1918, Va.), 96 S. E. 810..... 34
South Carolina v. United States (1905), 199 U. S. 436; 50 L. ed 261....109, 138
Southern Pacific v. Ortin (1879, C. C. Cal.), 32 Fed. 457..... 129
South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579; 93 Pac. 490 .....27, 134, 137
Springfield v. Walker (1885), 42 Ohio St. 543..... 144
Spring Valley Water Works v. Schottler (1882), 62 Cal. 69..... 29
State v. Superior Court (1901), 26 Wash. 278; 66 Pac. 385..... 58
State v. Superior Court (1902), 30 Wash. 219; 70 Pac. 484..... 58
State v. Tampa Water Works Co. (1908), 56 Fla. 858; 47 So. 358..... 81
Stehr v. Mason City Ry. Co. (1906), 77 Neb. 641; 110 N. W. 701.....57, 104
Steinhart v. Superior Court (1902), 137 Cal. 575; 70 Pac. 629.....70, 162
Stockton Gas Co. v. San Joaquin Co. (1905), 148 Cal. 313; 83 Pac. 54.... 27
Stuhl v. Northern Ry. Co. (1917), 136 Minn. 158; 161 N. W. 501..... 57
Swift v. Newport News (1906), 105 Va. 108; 52 S. E. 821..... 101
St. Helena v. San Francisco Ry Co. (1914), 24 Cal. App. 71; 140 Pac. 600 82
St. Louis Ry. Co. v. McElvain (1918 E. D. Mo.), 253 Fed. 123..... 62
St. Louis Ry. Co. v. Paul (1899), 173 U. S. 404; 43 L. ed. 746..... 129
St. Tammany Water Works Co. v. New Orleans Water Works Co. (1887), 120 U. S. 64; 30 L. ed. 563..... 125

Pages

Tidewater Ry. Co. *v.* Shartzer (1907), 107 Va. 562; 59 S. E. 407..... 74
Trego *v.* Hunt (1896), L. R. App. Cas. 7..... 41

United Railroads *v.* San Francisco (1917, N. D. Cal.), 239 Fed. 987.....
.....1, 60, 78, 98, 104, 114, 148, 157, 158
United States *v.* Grizzard (1911), 219 U. S. 180; 55 L. ed. 165..... 58
United States *v.* Quincy (1867), 71 U. S. 535; 18 L. ed. 403.....81, 82

Vallejo Ferry Co. *v.* Vallejo (1905), 146 Cal. 392; 80 Pac. 514.....37, 138
Vilas *v.* Manila (1911), 220 U. S. 345; 55 L. ed. 491..... 137
Vilhac *v.* Stockton R. Co. (1878), 53 Cal. 208.....70, 162
Vincennes *v.* Vincennes Traction Co. (1918, New York), 120 N. E. 27..... 24
Vincent Bros. *v.* New York R. Co. (1904), 77 Conn. 431; 59 Atl. 491.... 56, 62

Walla Walla *v.* Walla Walla Water Co. (1898), 172 U. S. 1; 43 L. ed. 341.43, 125
Western Pennsylvania R. Co. *v.* Hill (1867), 56 Pa. St. 460.....58, 63
Western Savings Fund Society *v.* Philadelphia (1858), 31 Pa. St. 175.... 142
Wichita Water Co. *v.* Wichita (1916, Kan. 2d Div.), 234 Fed. 415..... 138
Williams *v.* Los Angeles Ry. Co. (1907), 150 Cal. 592; 89 Pac. 330...30, 56, 103
Williams *v.* Meridian Ry. Co. (1915), 110 Miss. 174; 69 So. 596.....53, 103
Wilson *v.* Lewis (1872), 10 R. I. 285..... 134
Woodbury *v.* Beverly (1891), 153 Mass. 245; 26 N. E. 851..... 75

Other References.

	Pages
Am. & Eng. Encyc. of Law (2d ed.), Vol. 12, p. 1174	104
Am. & Eng. Encyc. of Law (2d ed.), Vol. 15, p. 1049	35
Booth on Street Railways (2d ed.), Sec. 77, p. 141	104
Booth on Street Railways (2d ed.), Sec. 80, p. 146	104
Booth on Street Railways (2d ed.), p. 200	35
Cal. Civ. Code, Sec. 469	22, 86, 155, 156
Cal. Civ. Code, Sec. 497	114
Cal. Civ. Code, Sec. 498	10, 114
Cal. Civ. Code, Sec. 499	6, 21, 77, 80, 114
Cal. Civ. Code, Sec. 500	22, 86, 155, 156
Cal. Civ. Code, Sec. 510	156
Cal. Civ. Code, Sec. 511	132
Cal. Const. of 1849, Art. IV, Sec. 31	128
Cal. Const. of 1879, Art. I, Sec. 14	3, 43, 52
Cal. Const. of 1879, Art. XXII, Sec. 12	52
Charter of San Francisco, Art. XII (preamble)	90
Charter of San Francisco, Art. XII, Sec. 2	90
Charter of San Francisco, Art. XII, Sec. 16	94
Cyc., Vol. 28, p. 125	137
Elliott on Roads and Streets (3d ed.), Vol. 2, Sec. 928, p. 381	104
Franchise of Complainant, Sec. 5	6, 77
Freund on Police Power, Sec. 512, p. 546	105
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Stats. of Cal., March 28, 1870	115
Stats. of Cal., April 4, 1870	115
Stats. of Cal., March 23, 1872	115
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Supreme Court of the United States

OCTOBER TERM, 1918

UNITED RAILROADS OF SAN FRANCISCO, *Appellant (Complainant below)*, vs. CITY AND COUNTY OF SAN FRANCISCO et al., *Appellees (Defendants below).*	No. 282

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal by the complainant below from a decree refusing it (complainant) any relief and in effect dismissing its bill for want of equity, after final hearing had in the District Court, Southern Division of the Northern District of California, Honorable William H. Hunt, circuit judge, presiding.* The jurisdiction of the court below was grounded in federal questions and not in diverse citizenship.

A. NATURE OF CASE AS PLEADED.

The appellant is a California corporation which operates a street railway system in San Francisco under various franchises therefor. The appellees are the City and County of San Francisco, a municipal cor-

* *United Railroads v. San Francisco* (1917 N. D. Cal.), 239 Fed. 987; R. 183.

poration, the chief executive, and the legislative body thereof (the Mayor and the Board of Supervisors) and other municipal officials who have charge of the operation of a municipally owned street railway system.

By its bill of complaint the appellant sought to enjoin the appellees from constructing tracks and operating cars outside of and parallel to the tracks of the appellant on streets covered by the latter's franchise and upon which it was already operating on one street for a distance of twenty-one consecutive blocks and on another street for a distance of two blocks, the latter construction, however, being an adjunct to the construction appertaining to the twenty-one blocks.

The bill of complaint raised federal and state questions. The appellant contended and alleged that the construction of the municipal tracks coupled with the operation of the cars thereon in the manner authorized by the ordinances would so interfere with the exercise and enjoyment of the complainant's franchise (whether exclusive or not) as to involve (a) an impairment of the obligation of that franchise in violation of the federal constitution, (b) a "taking" of the complainant's property in violation of the federal and the state constitutions and (c) a "damaging" of the complainant's property under the state constitution. In other words the complainant alleged that the *manner* in which the defendants purposed to construct and operate the municipal cars, i. e., on tracks laid outside of and parallel and close to the tracks of the complainant would necessarily involve an unlawful *physical interference* with the exercise and enjoyment of the com-

plainant's franchise. It alleged that the operation of municipal cars in the manner stated would *prevent* convenient access to and from complainant's cars and therefore prevent people from boarding those cars and would *deter* prospective passengers from boarding complainant's cars because of the danger of crossing the municipal tracks in front of rapidly approaching municipal cars when boarding or alighting from complainant's cars. The complainant contended that the operation of the municipal cars in the manner authorized by the ordinances would so interfere with the operation of the complainant's cars as to substantially impair the enjoyment of complainant's franchise. The complainant therefore invoked the provisions of the due process clause of the Federal constitution as well as the provision prohibiting the impairment of the obligation of contracts. The complainant also invoked the provisions of the Constitution of California providing that "private property shall not be taken or *damaged* for public use without just compensation having *first* been made to, or paid into court for, the owner.*

The complainant also alleged that the construction of a new municipal railway on streets occupied by the complainant's tracks would violate certain provisions of the charter of the City and County of San Francisco prohibiting the construction of *new* utilities until an effort had been made to acquire *existing* utilities. The complainant in this behalf contended and alleged that the city had not solicited from the com-

* *Cal. Const. of 1879*, Art. I, sec. 14.

plainant offers for the sale of its railway system as required by the charter.

B. NATURE OF CASE AS PROVED.

The evidence upon which the complainant relied below and here relies may now be stated.

Pursuant to authority granted to it by the Legislature of the State of California, the Board of Supervisors of the City and County of San Francisco on September, 15, 1879, granted to Market Street Railway Company of San Francisco (predecessor in interest of the complainant) a franchise to construct, maintain and operate (by animal or cable power) for the term of fifty years, a single or double track street railway along and upon certain streets in San Francisco, including Market Street, the chief artery and thoroughfare of the city's travel. The franchise on Market Street was for the whole length of that street, i. e., from the City Front (later renamed the Embarcadero) to Seventeenth Street, *a distance of more than twenty blocks* (R. 22). On May 29, 1882, the term of this franchise was extended so as to make it run for fifty years from the date of the amendment, instead of from the date of the original franchise (R. 25). On April 15, 1895, the Board of Supervisors of the City and County of San Francisco granted to Market Street Railroad Company, its successors and assigns, a franchise to construct, maintain and operate a single or double track railroad along certain other streets in San Francisco, *including Church Street* (R. 60).

The duration of this franchise was fixed as the unexpired term of the original fifty-year franchise of

September 15, 1879, as amended on May 29, 1882 (R. 61).

Each of these franchises required the grantee to file an acceptance of the franchise within a limited time, which, being done, the franchise "should be taken and deemed to be a contract between" the grantee and the city (R. 63). It also required the grantee to complete the authorized construction within a limited time. Both of these things were done, and for a number of years prior to 1906 the franchises were exercised and cars were operated by cable power. The complainant in 1902 succeeded to the rights of the original franchise-holder, and from that time until 1906 continued to operate a cable railway system along the streets named in the franchises, including Market Street and Church Street. After the earthquake and fire of 1906 the complainant was authorized and directed by an ordinance of the City and County of San Francisco to convert its cable lines into electric lines (R. 276). This the complainant did at a cost admitted to be in excess of $2,500,000 (R. 323). As soon as this change was effected the complainant commenced operating the electric system and has since operated the same (R. 278).

The cars of the complainant operating on Market Street, when they reach their destination at the Ferry Building on the City Front (now called the Embarcadero—the easterly terminus of Market Street, abutting on the western shore of San Francisco Bay) turn on a loop situate largely on property belonging to the State of California, the right to maintain which is dependent

upon a revocable license from the State Board of Harbor Commissioners, in which is vested the government and control of State property at the Ferry (R. 273).

At the time the complainant's franchises were granted Section 499 of the Civil Code of the State of California provided as follows:

> "Two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

In addition, the Market Street franchise of September 15, 1879, above mentioned in terms provided that:

> "It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th Section of the Civil Code of this state. This section shall apply to persons and companies as well as corporations."

In 1912 the City and County of San Francisco commenced the construction of a municipally-owned street railway system.

Since November, 1912, the municipality has been operating cars on Market Street from the Embarcadero to the intersection of Kearny, Geary and Market Streets, a distance of *seven* blocks.*

* If the count is made on the south side of Market Street rather than on the north side, the distance would be almost eight blocks (see map R. p. 262).

These municipal cars are operated on tracks laid outside of and parallel to the complainant's tracks, and, by agreement between the complainant and the city, used in common by the municipal cars and certain of the complainant's cars (R. 324).* The cars on the outside tracks turn at the Ferry Building (Embarcadero) on a second or outer loop, operated, also, under a revocable license from the State Board of Harbor Commissioners. By the construction sought to be enjoined in this suit, the municipality proposed to extend its tracks westward along Market Street from Kearny Street, through the most congested retail district, to Seventeenth Street, a distance of fourteen blocks or more.** In similar manner, it purposed to construct tracks on Church Street from the latter's intersection with Market Street (at Fourteenth), thence to Sixteenth Street, a distance of two blocks. The tracks of the municipality, according to the proposed extension of the municipal system, would, therefore parallel the tracks of the complainant for a distance of not less than twenty-one blocks on Market Street and two blocks on Church Street.

* The complainant sued to enjoin the city from operating cars on Market Street from Kearny and Geary to the Embarcadero claiming that such operation would violate the franchise of the complainant which limited the operation of a second railroad to five blocks on any street covered by complainant's franchise. During the pendency of the suit the complainant and the city entered into an agreement in compromise thereof, and for certain advantages thereby acquired, the complainant waived its right to object to the operation of municipal cars on Market Street between Kearny and Geary and the Embarcadero. In the agreement, provision was made for the joint use by the city and the complainant of certain of the complainant's tracks, for a division of the cost of maintenance of tracks, for exchange of transfers and other matters incident to operation (R. 324 et seq.).

** If the count is made on the north side of Market Street, the distance would be greater (see again map, R. 262).

The proposed extension of the municipal system in the manner hereinbefore mentioned has been authorized by two ordinances passed by the Board of Supervisors of the City and County of San Francisco. The first ordinance, passed February 17, 1915, authorized the construction of tracks from Van Ness Avenue along Market Street to Church Street, and thence along the latter street four blocks to Eighteenth Street (R. 151). The second ordinance passed August 17, 1916, authorized the construction of tracks (a) from Twin Peaks (Market at Seventeenth) along Market Street to Church Street, there connecting with the municipal tracks authorized by the first ordinance, and (b) from Van Ness Avenue eastward on Market Street to a connection with the existing municipal tracks on Market Street at Kearny (R. 152). These two ordinances are the laws under which the municipal system is being extended and which the complainant contends impair the obligation of its franchise and the enforcement of which is invalid for this and other reasons. It will be noted that prior to the enactment of the earlier of the two ordinances the city was operating cars on Market Street from Kearny and Geary to the Embarcadero. The first of the ordinances above mentioned authorized the construction of tracks on Market Street between Church and Van Ness Avenue and the second authorized the construction of two additional segments which would make the municipal line continuous on Market Street from Twin Peaks to the Embarcadero. These two segments were (a) from Twin Peaks to Church Street, and (b) from Van Ness Avenue to Kearny and Geary. It will thus be seen that the

city by the items of construction authorized in the two ordinances in connection with the portion of the municipal line from the Embarcadero to Kearny and Geary Streets, in operation since November, 1912, purposed to blanket the cars of the complainant along the whole length of Market Street.

The course and the manner of operation of the proposed municipal line is shown on the map appearing at page 262 of the Record, whereon the complainant's tracks are indicated by solid black lines, and the municipal tracks by broken red lines; the portion of the complainant's system in operation on Market Street prior to the present suit is that extending from Kearny Street eastward to the Ferry Building, and the extension of the municipal system which is the subject of litigation in the present suit, extends from Kearny Street westward to the end of Market Street at Seventeenth Street and an additional line on Church Street extends from the latter's intersection with Market at Fourteenth thence to Sixteenth Street.

Having stated the general nature of the proposed construction of the municipal line and the manner of operation of the municipal cars, we now purpose to show how such construction and operation will affect the operation of the complainant's cars and interfere with the exercise of complainant's franchise.

From the Embarcadero to Seventeenth Street (a distance of twenty-one blocks) the center of Market Street is occupied by the double-track street railroad of the

complainant.* The distance between the complainant's tracks is 6 feet 10 inches; the gauge between the rails is 4 feet 8½ inches (R. 261, 262); the clearance between the cars of the complainant, reduced by the overhanging of the cars, is 34 inches (R. 261). The tracks of the municipality, upon which, prior to the commencement of the present suit, it was operating on Market Street between the Embarcadero and Kearny Street, are *outside of and parallel to the tracks of the complainant.* The gauge between the rails of the municipal track is the same as that of the complainant's track—4 feet 8½ inches. The distance between the outer rail of the complainant's track and the inner rail of the municipal track is 6 feet 4 inches. The clearance between the municipal cars and the complainant's cars, reduced by the overhanging of the cars, is only *22 inches* (R. pp. 261, 262).

Market Street, it may be said, is the chief artery of San Francisco; it passes through the most congested business district and forms itself the most congested retail district in the city. Market Street is intersected upon the north by streets running northerly and southerly and easterly and westerly with the result that each crossing forms a junction of two streets with Market Street (see map, R. p. 262). Complainant's car lines run upon and branch from Market Street and across it to every part of the city. Its easterly terminus is on San Francisco Bay, and most of the overland traffic entering San Francisco finds its way into the city

* Under a provision of the Civil Code, expressly incorporated in its franchise, the complainant was required to construct its tracks "as nearly as possible in the middle" of the street (R. 23; Sec. 498 Civ. Code).

at the easterly end of Market Street (Embarcadero). There, also, all ferry boats carrying passengers on San Francisco Bay converge and make their landings to discharge and receive passengers entering and leaving the city from and to all bay points, but chiefly to points on the easterly side of the bay. The only other inlet or outlet to or from San Francisco by rail or water is the railroad depot of the Southern Pacific Company at Third and Townsend Streets in said city; at the latter point passengers entering and leaving San Francisco are discharged from and received into trains of the railroad company operating in a southerly direction on the peninsula on which San Francisco is situated, and running into and through the southern coast counties of California as well as into the eastern states of the United States by the southern route. Persons entering San Francisco by the Third and Townsend gateway travel (if by street car) on cross-town lines of the complainant and may transfer to the Market Street lines of the complainant when reaching that street. It may be said that practically all persons entering or leaving San Francisco who use street cars and practically all persons living in San Francisco who use street cars in going to or returning from their places of business and other errands, use the Market Street lines during all or some part of their various journeys.* The complainant carries daily upon all its Market Street lines an average of approximately 209,000 passengers, of whom about 51,000 represent passengers transferred from in-

*A map showing the various lines of the complainant and their relation to Market Street appears opposite page 150 of the Record.

tersecting lines of the complainant to its Market Street lines (R. 264). Much of the traffic on Market Street involves a short haul and is quite profitable. By reason of the volume of business on Market Street, and particularly during what may be termed the "rush hours", i.e., between eight and nine o'clock in the morning and five and six o'clock in the afternoon of each day, it is necessary to operate the various lines of the complainant on Market Street on a very short headway, with the result that in the central portion of the city, both east and west of Kearny Street the headway between cars of the complainant is only twenty-four seconds.

Except as otherwise noted the foregoing facts are admitted by the pleadings.

The great volume of traffic on Market Street leads frequently to traffic congestion even under favorable conditions. This congestion, according to complainant's witnesses, is noticeably increased by the operation of the municipal system. Although it does not and cannot object to the operation of municipal cars on Market Street from Kearny and Geary eastward to the Embarcadero, because by agreement with the city it has consented that the city may so operate, the complainant introduced evidence to show that the operation of the city's cars between the points mentioned on tracks outside of and parallel to the tracks of the complainant prevented ingress to and egress from the complainant's cars and prevented or deterred prospective passengers from boarding complainant's cars. It is obvious that the interference with the complainant's franchise consequent upon a paralleling of the complainant's

tracks for *twenty-one* blocks, though like in character to that resulting from a similar operation for *seven* blocks, would differ in intensity to an extent beyond that measured by the ratio between the length of the proposed operation and that already in force. The proposed extension of the municipal system would result in a greater number of municipal cars and a consequent shortening of the headway between those cars. The result would be that the interference with the operation of the complainant's cars would be greatly intensified, even in the seven blocks between the Embarcadero and Geary and Kearny Streets. The result of the operation of the municipal cars outside of and parallel to those of the complainant between Kearny Street and the Embarcadero may be best stated by reference to the testimony of some of the witnesses for the complainant, who testified in respect of the matter.

Mr. Von Phul, vice president and general manager of the complainant, testified as follows:

> "I have noticed several cases at different points on Market Street where there are traffic officers stationed and where there have been delays from one cause or another, accident or otherwise, the cars banked up one behind the other. Since I have been investigating the delays on Market Street I have seen the cars banked practically from Steuart Street up to the Palace Hotel, (between New Montgomery and Third Street). [a distance of 6½ blocks]. That would be due to an interruption across the track blocking the traffic. The banking up would be on both of the inbound tracks, but of course would be more noticeable on the inner track than on the outer track because of the greater number of cars on the inner track. I have noticed, but of course not to the same extent, the

banking up at different places where there are traffic officers stationed when the Market Street traffic has to halt while the other traffic crosses. When I have noticed the banking up of cars where there are four tracks and two lines of cars abreast of each other, passengers alighting from the car on the center track at times have to get off between that car and the car on the outer track. With respect to passengers getting on the cars on the center tracks the same conditions prevail, that is, they have to pass, if a car is on the outer track, between the cars to get around and enter the cars on the inner track. I have seen persons attempt to get on cars on the inner track and get out of the cars on the inner track under such conditions. Very many are nervous and afraid of the dangerous condition existing in such a situation. There is always danger in a condition of that kind, liability to accidents requiring great care both in the operation of the cars, and on the part of the person trying to board or leave the cars. It is also dangerous for persons to attempt to get on or off a standing car on the inner track where there are moving cars on the outer track. At different times I have observed people attempting to avoid moving cars in trying to get on and off United Railroad cars on the center tracks. I have observed that particularly just below Montgomery Street. There is a safety station at Montgomery Street. I have noticed passengers endeavoring to get from the safety station across the tracks and into the cars on the center tracks, particularly when the car on the outer track was moving. They would start, stop, come back, wait, and sometimes miss the car on the inner track. With cars on the outer track persons would have to go around the car on the outer track in order to get to the car on the inner track.

"The condition I have just described at Montgomery Street, I think is a general one wherever there are four tracks. It is my observation that all points on Market Street where there are four tracks, people endeavoring to get on or off the United Rail-

road cars are in difficulty and are in danger from the cars operating on the outer track. I think that condition would affect the business of the United Railroads at such points. I think it would have an effect both on the cost of operation of the road, and on the earning power of the road, assuming that the four tracks extend out Market Street. It would increase the difficulty of operation, it would require probably a slower operation and speed on Market Street, a greater number of cars to give the same headway service which is now given. All that would be necessary. The condition would operate in decreasing the revenue because the cars operated on the outer track would serve the same territories as the cars on the inner track, and the people that were bound for those territories would take the outer cars probably in preference to the inner ones, due to the danger of crossing over the outer tracks" (R. 258-259).

John T. Pidwell, a San Francisco attorney, told of his experience as follows:

"When I leave my office in the Mills Building, about five o'clock in the evening, to reach my home it is necessary for me to take the Haight Street car, if I am going on the United Railroad cars. When I reach the safety station near the junction of Montgomery and Market, *I have often found, or always found, that the Haight Street car would be blocked; it would be almost impossible for us to board the Haight Street car on account of the many Municipal cars that come on the track closer to the safety station. Many times I have missed a car, and in a hurry I have taken a jitney to reach my home promptly. I have noticed many young ladies who desired to board the United Railroad cars at that place that seemed to be panic-stricken when they found the municipal cars approach and did not seem to even stop. I have seen many other persons daily having the same difficulty that I experienced. The difficulty that I have observed that people have*

of getting on the United Railroad cars is the rule rather than the exception. I know that I myself have been deterred from taking those cars, and have given up the attempt'' (R. 265-266).

Henry T. Jones, general superintendent of the United Railroads, speaking of a banking of cars at Kearny and Market Streets, testified as follows:

"It is a common occurrence to see at least six cars standing there waiting, during the rush hours and frequently in the daytime, too. I have had occasion to watch passengers getting on and off the cars at different stopping places between Kearny Street and the Ferry. *It is almost impossible at times for passengers to get to the inner cars at all. I have frequently been on Market Street when a car on the inner track has been waiting there and a car on the outer track will run up on that car and scatter the people like a lot of wild sheep. I have frequently seen people, in order to get on and off a car, get between the cars that are standing there. It is a very dangerous position and it depends on the size of the man or woman whether he or she can stand there or not.*

"With reference to people endeavoring to get on and off cars at safety-stations where there are four tracks, at times it is practically impossible. Take Montgomery Street for instance. A car will come up and stop on the inner track. Persons go to get on that inner car and another car on the outer track will come up and scare the people and they cannot go on, although the car on the outer track is supposed to stop ten feet ahead of the car on the inner track. By the time the passengers get around there is another car on the outer track coming up and it blankets them there and it is impossible for them to get on. It is a frequent condition at such a safety station as Montgomery, or any other safety station, to see two cars standing on the outer track, one behind the other. In such a case, people lose their car entirely. Their car goes away and loses

them. They have to wait for another. This condition is a very common one. I see it several times a day. Anyone can go down there and see the same condition."

* * * * * *

"If the proposed track should be built out Market Street cutting various intersecting tracks of the United Railroads, it would cause great delay in the operation of the complainant's cars and more congestion of traffic. It would most assuredly increase the danger in the operation of the cars. I think it would make more likely an increased number of accidents. It would be bound to increase the danger of collision between cars at the crossing places.

"I have frequently noticed instances where people endeavoring to get to the United Railroads' cars would give up the job. It is a common occurrence—a daily occurrence. I have seen as many as five trying to get on a car and probably one or two would get on and the others would run away because of a car on the outer track coming up and blanketing them. I have had numerous complaints from people about that condition in getting on and off the complainant's cars. It has been a common occurrence to receive such complaints" (R. 267, 268, 269).

The condition described by the witnesses appeared to the trial judge to be so obvious that he requested a curtailment of the evidence upon the subject, saying:

"* * * you might, it seems to me, practically agree on all sides obviously *that convenient access to the inner car is interfered with if you permit the outer car to lie alongside of the inner car; that is a self-evident proposition"* (R. 264).

This observation of the court induced the following colloquy between the court and counsel:

"Mr. CANNON. And I think it is just as obvious if the outside car is moving that there is interference in getting to the cars.

"The COURT. These are questions, of course that may only become relevant as bearing on the question of whether or not the city has or has not the power to authorize the occupancy of the street or the way in the street by additional cars, and that comes back, to the question of the construction of the power of the city; of course I think it is perfectly plain that the case is not to be decided upon the question of the latitude of convenience that there might be unless the inconvenience is so great that to permit it to continue would be in effect confiscation of property.

"Mr. CANNON. Or under our constitution, damage to property, which uses that term.

"The COURT. I should think you could curtail a great deal of this; it does not need any argument, for instance, or the testimony of witnesses, to show that that thing which is self-evident must happen; that if you have got an inner car and an outer car and a man wants to take the inner car, it is quite inconvenient for him to do it; I should say that obviously there would be greater traffic on the outer car by persons desiring to go shorter distances upon a street occupied by four cars unless the traffic is so regulated that he thinks that he can just as conveniently step across the outer track and take the inner car. I do not think argument will be necessary on that.

"Mr. CANNON. We take the same view, your Honor.

"The COURT. So that you may curtail a great deal of this, by permitting your record to contain a few statements of that kind.

"Mr. CANNON. It was only offered, if your Honor please, because the city, while admitting the physical condition, denied that it had any such effect, so in order to be on the safe side we thought we would introduce evidence as to what the facts are.

"Mr. HAVEN. The court has described what seemed to it to be obvious, and it seems to us to be obvious, and I am perfectly willing to stipulate what the fact is" (R. 264, 265).

The testimony which provoked the colloquy between counsel and court was directed to the effect of the operation of municipal cars outside of and parallel to those of the complainant for seven blocks; that is, from Kearny Street eastward to the Embarcadero.* By the construction and operation which the complainant sought to enjoin in the present suit, the defendants purposed to extend their lines for a distance of fourteen additional blocks on Market Street, thereby necessarily increasing the number of cars, decreasing the headway between the cars, and augmenting and intensifying the conditions which the witnesses, with respect to the more limited operation, had described as preventing free access to the complainant's cars and depriving the complainant of patronage because of the dangers incident to crossing the outer tracks to the cars of the complainant in front of rapidly approaching municipal cars.

The complainant had in court other witnesses to testify to the effect upon the complainant's franchise of the operation of municipal cars on tracks parallel to and outside of the complainant's tracks.

Counsel for the complainant stated to the court that such witnesses were in attendance but that he would not

* As previously stated, the complainant does not object to the operation of defendants' cars on Market Street between Kearny and Geary and the Embarcadero. The complainant introduced evidence concerning the effect of such operation to show how and to what extent the operation of complainant's cars would be interfered with and the enjoyment of its franchise impaired by the proposed extension of the municipal line from Kearny Street to Seventeenth Street.

call them out of deference to the court's view that testimony with reference to the inaccessibility of the complainant's cars and the danger of access to them caused by the municipal cars was proof of the "obvious" and the "self-evident". The following occurred:

> "Mr. CANNON. If your Honor please, I have several other witnesses here who will give testimony along the line that Mr. Pidwell gave, but I do not like to call them in view of your Honor's statement as to what might be considered obvious.
>
> "The COURT. I should think it would not be necessary to call them.
>
> "Mr. CANNON. Very well, we will not call them in view of your Honor's suggestion" (R. 273).

The character of the blanketing of complainant's cars by the municipal cars to which the witnesses for the complainant referred is well illustrated by the photographs appearing at the Record opposite pages 294 and 296, all of which show municipal cars on the outer track, not only preventing convenient access to the complainant's cars on the inner track, but almost preventing even a view of those cars.

In addition to its claim that the manner of operation of defendants' cars would unlawfully interfere with the enjoyment of its franchise, without regard to whether the franchise was exclusive or not, the complainant also contended that its franchise was exclusive for all over five blocks on any street covered thereby and that for this additional reason the guaranties of the constitutional provisions, state and federal, above mentioned, were available to it. This contention of the complainant was based upon a statute of California, expressly incorporated in its franchise, which prohibited the

"occupation and use" of any street by two railroad corporations for more than five blocks.*

The effect of the proposed municipal construction sought to be enjoined by the complainant, in addition to interfering with safe and convenient access to the cars of the complainant, was described by Mr. Von Phul, the vice president and general manager of the complainant, as follows:

> "I am familiar with the various crossings from the foot of Market Street clear out to Fifteenth and Castro Streets. If the proposed municipal line should be constructed outside of the center tracks and across all of these various tracks intersecting and crossing Market Street, I think that the same condition would exist at the various crossing points as now exists at Market and 3rd Streets. The difficulty of operating the complainant's cars would be largely increased and the cars would bank up at these crossings proportionately on account of the cars having to cross in two ways. I think such congestion would delay the operation of the complainant's cars under the present schedule. I do not think that the cars could be operated as rapidly and as economically if the crossings were made. It would be necessary to have more cars if the speed was decreased in order to maintain the same headway as now. Additional cars would involve additional expense and involve other difficulties in the operation on Market Street. It would mean that the cars would be that much more numerous on Market Street, causing greater congestion at these different points. If two additional tracks should be constructed by the defendants, the same conditions would prevail on Market Street southwesterly from Geary Street as now prevail on Market Street between Geary and the Ferry" (R. 259).

* *Cal. Civ. Code*, Sec. 499.

Mr. Jones, general superintendent of the complainant, testified to the same effect (R. 268).

The complainant also alleged that the defendants purposed to cut the rails and cross the tracks of the complainant at various points without paying the complainant for the easement thus appropriated as required by California statutes,* and without making compensation for the injury to the complainant's franchise which would result from the interruption of traffic on complainant's tracks, the increased cost of operation of complainant's cars caused thereby and the curtailment of the full enjoyment of the complainant's franchise consequent thereon.

The complainant also claimed that the city had failed to comply with certain provisions of the San Francisco charter requiring solicitation of offers for the *sale of existing* utilities before proceeding with the *original construction* of a like utility. The evidence relating to this contention of the complainant is set forth and discussed in the portion of the brief dealing with the claim itself.

Assignment of Errors.

The appellant relies upon all the assignments of error set forth in the Record at pages 335-339. These assignments, variously expressed, may be said to sum up the following as the particulars in which the appellant claims that the decree appealed from is erroneous.

* *Cal. Civ. Code*, secs. 469, 500.

1: Said decree is erroneous in that it permits the impairment of the complainant's contract (i. e. its franchise) by the proposed municipal action.

2: Said decree is erroneous in that it permits the complainant to be deprived of property without due process of law.

3: Said decree is erroneous in that it permits the "taking" of the property of the complainant (i. e. its franchise) without compensation being first paid.

4: Said decree is erroneous in that it permits the "damaging" of the property of the complainant (i. e. its franchise) without compensation being first paid.

5: Said decree is erroneous in that it permits the construction of a new public utility by the municipality without any attempt by the municipality to purchase the complainant's system, as required by Section 2, Article XII of the Charter of the City and County of San Francisco.

Argument.

I.

THE COMPLAINANT'S FRANCHISE CONSTITUTES AN IRREVOCABLE CONTRACT, THE OBLIGATION OF WHICH WILL BE IMPAIRED BY THE PROPOSED MUNICIPAL ACTION.

A. The complainant's franchise is an irrevocable contract.

Authorities in support of the proposition stated in the heading might be multiplied *ad infinitum*. It is un-

necessary, however, to do more than cite a few of the cases.

See:

Grand Trunk Co. v. South Bend (1913), 227 U. S. 544; 57 L. ed. 633 (reversing 174 Ind. 203; 89 N. E. 885);

Boise Water Co. v. Boise City (1913), 230 U. S. 58; 57 L. ed. 1389;

Russell v. Sebastian (1914), 233 U. S. 195; 58 L. ed. 912;

Cleveland v. Cleveland Ry. Co. (1903), 194 U. S. 517, 533; 48 L. ed. 1102, 1108;

Fletcher v. Peck (1810), 6 Cranch, 87; 3 L. ed. 162;

People v. O'Brien (1888), 111 N. Y. 1; 18 N. E. 692;

Citizens' R. Co. v. City Ry. Co. (1893, C. C., Ind.), 56 Fed. 746. (Affirmed 166 U. S. 557; 41 L. ed. 114 [1897]);

Africa v. Mayor (1895, C. C., E. D. Tenn.), 70 Fed. 729, 733-734;

Cleveland Ry. Co. v. Cleveland (1899, C. C., N. D. Ohio), 94 Fed. 385;

Mercantile Trust Co. v. Collins Park R. Co. (1900, C. C., N. D. Ga.), 101 Fed. 347;

Vincennes v. Vincennes Traction Co. (1918 New York), 120 N. E. 27;

People v. New York Ry. Co. (1918 New York), 120 N. E. 155.

See, also:

Interurban Ry. Co. v. Public Utilities Commission (1918 Ohio), 120 N. E. 831,

citing numerous cases.

B. The complainant's franchise vested the complainant with an easement or right-of-way in the streets covered by the franchise, which easement or right-of-way is "property" under the protection of the constitutional guaranties.

The complainant's franchise being a contract, it is desirable to ascertain what *property* rights were thereby vested in the complainant in the streets covered by the franchise. It is a well-settled rule in California, and, we may add, elsewhere, that a street railway company authorized by statute to construct tracks on a city street acquires an easement in the portion of the street between its tracks which constitutes real property, and as such is entitled to protection.

In *Appeal of the North Beach & Mission R. R. Co.* (1867), 32 Cal. 500, the syllabus reads as follows:

> "The interest in the street of a street railroad company authorized by statute to lay down a track in the streets of a city and run cars over it for the conveyance of passengers for hire, *is an easement in the land; and the estate of such company in the street is real property.*"

In the body of the opinion it is said (p. 512):

> "* * * it appears that the appellant has acquired an interest in the soil in Kearny street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose, in the mode

prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement became themselves a part of the land—of the estate of the company—and that, in those States where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate in the same manner, and upon the same principles, as land—as if the company owned the land itself upon which the track is laid to the extent of its interest in it. The interest is local—fixed to the particular land, the particular street—and cannot be enjoyed beyond or independent of that fixed locality. It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other; and *the right of the street railroad company to the exclusive control and enjoyment of its estate in the soil of the street to the full extent of that estate, is as perfect as the right of the lessee or owner of the lot fronting on the same street to control and enjoy his estate.* The several estates are substantially of the same kind, and are of equal dignity before the law, but one is larger, more extensive than the other. Practically, they differ only in the quantity of interest, not in quality."

And at page 513 it is said:

> *"Whatever change in any particular street, therefore, will increase or diminish the travel in its cars, must, directly, in the same ratio, increase or diminish the value of its easement—its estate in the particular street in which the change is made, and upon which such increase or diminution depends."*

The foregoing case is cited and approved in

Los Angeles Co. v. Hubbard (1911), 17 Cal. App. 646; 121 Pac. 306.

In *O'Sullivan v. Griffith* (1908), 153 Cal. 505; 95 Pac. 873, the court said:

> "The right to use the streets of a city as a way upon which to build and operate a street railroad is a right in real property, an incorporeal hereditament." (95 Pac. 874.)

See, also:

Stockton Gas. Co. v. San Joaquin Co. (1905), 148 Cal. 313; 83 Pac. 54;

South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579; 93 Pac. 490;

Matter of Russell (1912), 163 Cal. 668, 679; 126 Pac. 875, 879.

Ex Russell vs Sebastian 233 U.S. 195

Elsewhere the authorities are to the same effect.

In *Hamilton Traction Co. v. Hamilton Transit Co.* (1904), 69 Ohio St. 402; 69 N. E. 991, the court, speaking of the right acquired by a street railroad corporation through a franchise to use the city streets, says:

> "The right which the grantee acquires by such grant is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public." (69 N. E. 994.)

In *Peoria Ry. Co. v. Peoria Terminal Co.* (1911), 252 Ill. 73; 96 N. E. 689, it is held that:

> "Where a street railway company by ordinance is granted the right to construct a railway system

for a definite period over certain streets, it thereby acquires the exclusive right to that portion of the streets granted to it for railway purposes during the term of the grant" (syllabus).

In *Lake Shore Ry. v. Cincinnati Ry.* (1876), 30 Ohio St. 604, the court, speaking of the right of a street railroad in the city street, said (p. 614):

> "This property, as distinguished from the franchise to be a corporation, and to maintain and operate a railroad over it, under the charter, is held by the same tenure as that of all other railroads, and its owner is entitled to compensation for its appropriation, the same as an individual."

See, also:

Lake Shore Ry. Co. v. Chicago R. Co. (1881), 100 Ill. 21;

Chicago R. R. Co. v. Englewood Ry. Co. (1886), 115 Ill. 375;

Chicago R. R. Co. v. Chicago & St. Louis R. R. Co. (1884), 15 Ill. App. 587;

Memphis R. Co. v. Birmingham Ry. Co. (1892), 96 Ala. 571; 11 So. 642.

Birmingham Traction Co. v. Birmingham Ry. Co. (1898), 119 Ala. 129; 24 So. 368;

Mobile R. Co. v. Louisville R. Co. (1915); 192 Ala. 136; 68 So. 905;

The principle declared in the foregoing cases is, as we have stated, settled law, and, as we shall hereafter show, is recognized and applied in the statutory provisions of California.

So much for the interest in the street itself, acquired by the complainant through its franchise. Other rights

no less certain and even more valuable were acquired by the complainant—rights arising from the very nature of the franchise.

C. The franchise of the complainant secured to the complainant a right of reasonably safe and convenient access to its cars which right could not be destroyed or substantially impaired without impairing the obligation of the franchise.

The franchise of the complainant was a right to construct tracks and to operate cars upon the streets covered by the franchise, to receive and carry passengers on such cars, and to charge for the service so rendered. These elements of the franchise are also *"property"* and entitled to protection to the same extent as any other species of property. This proposition is elementary.

See, however:

Spring Valley Water Works v. Schottler (1882), 62 Cal. 69;

Gulf Railroad Co. v. Hewes (1901), 183 U. S. 66; 46 L. ed. 86;

Belleville v. Turnpike Co. (1908), 234 Ill. 428; 84 N. E. 1049.

The *right* in the grantee of a franchise to carry passengers necessarily implies a correlative *duty* on the part of the grantor to refrain from doing anything that will *physically interfere* with the exercise and enjoyment of the right granted. It implies a *duty* upon the part of the grantor to refrain from any *physical interference* with the franchise which will prevent or deter the public from patronizing the grantee of the franchise.

> "Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers necessary to the full use and beneficial enjoyment of the grant; and where such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement."
>
> *Commonwealth v. Temple* (1859), 14 Gray 69, 77 (per Shaw, C. J.).

A street railway franchise, therefore, necessarily includes reasonably safe and convenient access to cars operating under the franchise. It is patronage that gives substance and value to a franchise. Patronage, in turn, is dependent upon the ability of the public to make use of the utility. A grant of a street railway franchise with a reserved right to prevent the use of the street cars by the public would be a legal solecism. The franchise of the complainant carried with it, therefore, a right of access to its cars. This right of access is a property right inhering in the franchise and entitled to protection to the same extent. It is part and parcel of the franchise.

In *Williams v. Los Angeles Ry. Co.* (1907), 150 Cal. 592; 89 Pac. 330, the court enumerates the easements appurtenant to property abutting upon public streets, and among them includes "the right of ingress and egress to and from the lot over and by means of the adjacent portion of the street", citing many cases.

In *Eachus v. Los Angeles Ry. Co.* (1894), 103 Cal. 614; 37 Pac. 750, the court says (103 Cal. 617):

> "The right of the owner of a city lot to the use of the street adjacent thereto is *property* which

cannot be taken from him for public use without compensation;" • • •

And, again (p. 618):

"*Such easement is a right of property incident to the lot itself,* and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he had the fee in the street or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief."

To the same effect see:

Ford v. Santa Cruz R. R. Co. (1881), 59 Cal. 290;

Bigelow v. Ballerino (1886), 111 Cal. 559; 44 Pac. 307;

Smith v. Southern Pacific R. R. Co. (1905), 146 Cal. 164; 79 Pac. 868;

Cushing-Wetmore Co. v. Gray (1907), 152 Cal 118; 92 Pac. 70;

Coats v. Railway Co. (1905), 1 Cal. App. 441; 82 Pac. 640;

Fairchild v. Oakland Ry. Co. (1917, Cal. Sup. Ct.), 169 Pac. 388;

Partridge v. Richmond (1918, Cal. Ct. App.), 172 Pac. 166.

In passing it may be observed that the rule announced in these California cases in respect of the *property* right of access, constitutes the rule of decision in this court.

Guffey v. Smith (1915), 237 U. S. 101; 59 L. ed. 856 and cases cited.

D. The operation of the municipal cars in the manner proposed will impair the obligation of the complainant's franchise.

The complainant contends that its franchise vested it with rights which are exclusive except for five blocks. This contention will be discussed later.

But the impairment of the complainant's franchise that will follow from the operation of the municipal cars *in the manner proposed* i. e. upon tracks outside of and parallel to the tracks of the complainant arises, quite regardless whether the complainant's rights are exclusive or not. As shown by the witnesses for the complainant the operation of municipal cars on tracks outside of and parallel and close to the tracks of the complainant will *prevent* many people from riding on the complainant's cars and *deter* many others from doing so. The operation of the municipal cars, therefore, will impair the free exercise and enjoyment of the complainant's franchise by physically interfering with such exercise and enjoyment.

In *Ninth Avenue R. R. Co. v. N. Y. Elevated R. R. Co.* (1877), 3 Abbott's New Cas. 347, the court held that the plaintiff not having an exclusive franchise could not enjoin competition by a second franchise-holder. The court, however, was careful to note that (p. 395):

> "The alleged appropriation or invasion of any part of the plaintiffs' road is expressly negatived by the finding that the running of defendants' cars and engines upon the Sixth avenue over plaintiffs' road, in case the defendants' road were constructed, would not prevent the practical running of plaintiffs' cars by horses, or materially increase the expense of such running."

Speaking of the damage suffered by the plaintiff through a loss of patronage, the court further said (p. 396):

> "Such special damage results from no interference on the part of the defendant with either the franchise or tracks of the plaintiff."

In *Piatt v. Covington Company* (1871), 71 Ky. 31, the owners of a ferry franchise sought to recover damages from a bridge company "for injury to their property, and loss sustained in their custom and business, in consequence of the erection of" a bridge. The Supreme Court of Kentucky affirmed a judgment in favor of the defendant upon the ground that (p. 37):

> "* * * where the construction of a bridge will interpose no *physical obstruction to the enjoyment of a ferry franchise* across the same river, the owners of the ferry are not entitled to compensation for any incidental impairment of the profits of their ferry resulting merely from the use of the bridge instead of the ferry by the public."

Further in the opinion the court said (p. 38):

> "It does not appear that the ferry-landing of the appellants was necessarily affected or obstructed by the erection of the bridge;"

In *Rutland Electric Light Co. v. Marble City Electric Co.* (1893), 65 Vt. 377; 26 Atl. 635, the court held that an electric light company was entitled to a decree restraining a later company "from maintaining its wires so as to interfere with those of the 'plaintiff' ". The court in its opinion styles as "plain" the proposition that the

> "defendant's rights were subordinate to the orator's, and must be exercised in such a manner as not to interfere with them"

notwithstanding that the orator had no exclusive rights under its franchise.

It should be borne in mind that the complainant and the municipality in operating rival street railway systems are serving the same public use, and the complainant, by reason of its priority of right, is entitled to protection against the city, which cannot draw upon its *governmental* powers to enlarge the scope or operation of its *proprietary* rights.

> *Los Angeles Gas Co. v. Los Angeles* (1917, S. D. Cal. S. D.) 241 Fed. 912.

and see

> *Moore v. New Orleans Water-Works Co.* (1902, C. C. E. D. La.); 114 Fed. 380.

Snidow v. Board of Supervisors (1918 Va.), 96 S. E. 810, was a suit by the owners of a ferry franchise against the Board of Supervisors to prevent the establishment of a bridge. The case involved, among others, the question whether the ferry franchise was exclusive. The court held that it was not, and said (p. 815):

> "The erection and operation of the bridge is not an infringement of the ferry franchise, and does not render the owner or operator of the bridge liable in damages to the owner of the ferry, although the practical effect of the operation of the bridge may be to draw away all custom from the ferry, so as to wholly destroy the value of the ferry franchise."

The court further held, however, that the rule stated was subject to the qualification that the bridge "does not physically obstruct the approach to or operation of the ferry".

Further in the opinion it is said (p. 818):

> "Should the actual construction of the approach to the bridge physically obstruct the public road approach to either the eastern or western ferry landing of appellants, and no other reasonably equally convenient public road approach or approaches thereto be provided, so as to prevent such obstruction, the proceedings in the instant cause will furnish no bar against the appellants in the future asserting, in such a proceeding as may be authorized by law, their right to operate their ferry free from physical obstruction to its approaches, or to the recovery of proper damages for any injury which may be occasioned by such obstruction."

In *15 Am. & Eng. Ency. of Law* (2d ed.) 1049, the rule is thus stated:

> "The obligation of the contract implied in a grant will be impaired by a legislative attempt to revoke the grant or by the imposition of subsequent *burdens* or conditions on the *use or enjoyment* of the property, right, or franchise granted."

In *Booth on Street Railways* (2d ed.), the author says (p. 200):

> "While a prior occupant, in the lawful enjoyment of its franchise, will not be heard to object on the ground of an apprehended or actual loss or diminution of profits arising from a division of its patronage with a second company, cases may arise where it would be entitled to protection against an invasion of its rights under color of the exercise of legislative or police powers. *Either parallel lines or crossings might be so located or constructed as*

to prevent or materially impair the use of tracks laid under an earlier grant. This would not be damnum absque injuria."

In *Nellis on Street Railways* (2nd ed.) Vol. 1, the author, after discussing the right of a municipal corporation to grant a second street railway franchise in a street over which another franchise has been granted, says (p. 147):

> "But the grant to operate a street railroad in a particular street prevents the common council from authorizing any other company *to use such street in any way destroying, hindering or embarrassing the use under the former franchise."* citing
>
> *City Ry. Co. v. Citizens' Street R. Co.* (1897), 166 U. S. 557; 41 L. ed. 1114;
>
> *Fidelity Trust Co. v. Mobile St. R. Co.* (1892, C. C., S. D. Ala.), 53 Fed. 687.

The case last cited was a suit for an injunction by the receiver of a street railway company against a second street railway company. It appeared that during the progress of the receivership proceedings an ordinance had been passed by the city of Mobile allowing the defendant to lay its tracks for five blocks *partly within and partly without the rails of the first company.* The first company sued to enjoin such construction. No contention was made that the first company had an exclusive franchise. In granting the injunction the court, among other things, said (p. 688):

> "The grant to the Mobile Street Railway Company, in its own nature, amounts to an extinguishment of the right of the grantors, and implies a contract not to reassert that right; and said railway

> company should be protected from impairment of its privileges and franchises under such grant by any attempt to appropriate or interfere with the same for the use of the Mobile Electric Railway Company; and *if the use proposed to be made by the Mobile Electric Railway Company of the roadbed or track of the Mobile Street Railway Company obstructs, hinders, or embarrasses the use and usefulness of that part of the first acquired right which is in actual use by the receiver, it would be an illegal use, and should be prohibited.*"

A similar case is *Hamilton Traction Co. v. Hamilton Transit Co.* (1904), 69 Ohio St. 402; 69 N. E. 991, the holder of a *non-exclusive* railway franchise in the City of Hamilton, Ohio, was held entitled to enjoin the straddling of its tracks by the holder of a later franchise. The Supreme Court of Ohio held that to permit such construction would (a) impair the obligation of the plaintiff's franchise; and (b) "take" its property without due process of law.

Speaking of the rights of the plaintiff under its non-exclusive franchise, the court says:

> "* * * it has the right, during the life of the grant, to the possession and enjoyment of that franchise and easement without *interruption or obstruction* from any other company, until such time, at least, as it may voluntarily surrender the same, or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and laws of the state of Ohio." (69 N. E. 993.)

See, also:

Hot Springs Co. v. Hot Springs (1902), 70 Ark. 300; 67 S. W. 761-762;

Vallejo Ferry Co. v. Vallejo (1905), 146 Cal. 392; 80 Pac. 514.

The latter case was a suit to restrain the trustees of the City of Vallejo from constructing a wharf along the waterfront of that city in such manner as to injure or destroy an existing ferry franchise. The court found that the wharf, as contemplated, would extend beyond the ferry-slip of the complainant, and, further, that if constructed according to proposed plans, it would

> "extend in front of the entrance of said slip and * * * interfere with and prevent free ingress and egress of said ferry-boats of plaintiff to and from said ferry-slip last mentioned, and * * * obstruct the use by said plaintiff of said ferry-slip."

The court also found that the proposed wharf would *interfere* in other particulars with the exercise of the ferry franchise, and therefore decreed that the defendants must modify their plans in the manner designated by the decree so as not to interfere with the exercise and enjoyment of the plaintiff's franchise. The City of Vallejo appealed from the decree. Its contention is thus stated in the opinion of the Supreme Court:

> "Appellants claim that the city has the right to build a wharf at the point proposed; that in passing the ordinance in pursuance of this right the city necessarily and conclusively determined that there existed a public necessity for the wharf, and that it was therefore no infringement of any right vested in plaintiff, but that it is plaintiff's duty and is its only right to adjust its means of enjoying its franchise to the needs of the city for the new wharf." (146 Cal. 396.)

Said the court:

> "It cannot be doubted that the city has the right to construct a wharf at Virginia-Street water-front

(sec. 34, Charter of the City—Stats. 1899, p. 381), and it may be admitted that the necessity for establishing the wharf was determined by the ordinance authorizing its construction. *But this does not mean that the city may in the exercise of such right interfere to the extent of destroying rights vested in others by the city, and that, too, without pretense of compensation.*" (146 Cal. 397.)

Speaking of the charter right of the City of Vallejo to build a wharf, the court quotes with approval from the earlier case of *San Pedro v. Southern Pacific R. R. Co.* (1894), 101 Cal. 333; 35 Pac. 993, as follows:

> "The authority given in this section [a charter provision similar to that in the Vallejo charter] does not, however, clothe the plaintiff with an absolute right to construct a wharf at any point on its water-front which it may select, irrespective of the rights of others; *but is intended to confer upon it the same authority to do the acts therein enumerated which a natural person would possess.*
> * * *

Continuing, the court said:

> "The claim that if the rights of plaintiff and defendants conflict the right of the municipality must prevail cannot be sustained in the present case." (146 Cal. 397.)

Accordingly the decree of the trial court was affirmed, thereby compelling the City of Vallejo to construct its wharf in such manner as not to interfere with the free exercise and enjoyment of the plaintiff's ferry franchise by preventing convenient ingress and egress to and from its ferry-slip.

The foregoing cases clearly illustrate the difference between the exercise of a second franchise which les-

sens the emoluments of a first franchise *but does not interfere with the exercise of the first,* and operation under a second franchise *in such manner as to physically interfere with the exercise* of a first franchise. If the second franchise *does not interfere with the exercise of the earlier franchise,* the obligation of the earlier franchise is not impaired, no matter to what extent its emoluments may be lessened or its value reduced by reason of the exercise of the second franchise. If the exercise of a second franchise *does interfere with the exercise of an earlier franchise,* the obligation of the earlier franchise is impaired. The grantor of a non-exclusive franchise does not warrant that it will not, either by itself or others, exercise a second franchise that will lessen the emoluments of an earlier franchise; it does, in effect, warrant that it will not by itself or others *interfere with, or prevent the exercise of the earlier franchise.*

The case is not unlike the warranty implied in the sale of the good-will of a business. The rule is universal that upon such a sale the vendor impliedly warrants that he will not by direct solicitation endeavor to withdraw from the vendee the patronage which constituted the good-will. Unless the vendor *expressly* covenants not to do so, he may freely *compete* with his vendee, and the loss of patronage which the vendee suffers through competition is *damnum absque injuria.* But although he may *compete,* the vendor may not, by solicitation or other direct means, endeavor to regain the patronage which made up the good-will that he sold. The reason for this rule is thus expressed in the leading case of

Trego v. Hunt (1896), L. R. App. Cas. 7, as follows (p. 25):

> "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

This case is cited with approval in *Ferris v. Pett* (1919 R. I.) 105 Atl. 369).

See, also:

Hilton v. Hilton (1918 N. J.), 104 Atl. 375, citing cases from other jurisdictions to the same effect as *Trego v. Hunt.*

> "Competition, an honest, healthy competition, is productive of good. The law affords no aid to that kind of competition which claims the right to crush a competitor, to advance a rival interest."
>
> *The Central City Horse Railway Company, etc. v. The Fort Clark Horse Railway Company* (1876), 81 Ill. 523, 529.

This rule applies to a municipal corporation to the same extent that it applies to a private individual or corporation.

See, again:

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal. S. D.) 241 Fed. 912.

The evidence in the Record clearly brings the case of the complainant within the principle just discussed. The complainant, by its franchise, acquired the right to have access to its cars remain reasonably safe and convenient. It was entitled to exercise and enjoy its franchise *without physical interference* from the grantor of the franchise. Particularly was it entitled to have the streets upon which its cars were operating unobstructed by any public improvement that would so interfere with the operation of its cars as to prevent safe ingress to and egress from the cars and thus prevent or deter prospective passengers from riding on them. The evidence in the Record shows that the construction authorized by the city will both *prevent* and *deter* prospective passengers from riding on the complainant's cars. When cars of the city are banked upon the outer track, one behind the other, access to the cars of the complainant on the inner track is impossible. On the other hand, many members of the public will be *deterred* from riding on the complainant's cars because of the necessity of crossing the city's tracks in front of rapidly approaching municipal cars in order to board or alight from the complainant's cars.

E. The complainant's franchise is an exclusive one as we shall later show and for this additional reason the ordinances complained of impair the obligation of complainant's franchise.

The complainant contends that its franchise is exclusive for all exceeding five blocks on any street covered thereby. This contention will be later discussed.

It is obvious, of course, that if the contention be correct, it follows necessarily that the operation of the municipal line will impair the obligation of the complainant's franchise.

Chenango Bridge Co. v. Binghampton Bridge Co. (1866), 3 Wall. 51; 18 L. ed. 137;

Walla Walla v. Walla Walla Water Co. (1898), 172 U. S. 1; 43 L. ed. 341 (affirming 60 Fed. 957);

New Orleans Water-Works Co. v. St. Tammany Water-Works Co. (1882), 14 Fed. 194 (affirmed 120 U. S. 64; 30 L. ed. 563 (1887).

See, also:

Monett Co. v. Monett (1911, C. C. Mo.), 186 Fed. 360;

Mason v. Harper's Ferry Bridge Co. (1879), 17 W. Va. 396.

II.

THE PROPOSED MUNICIPAL ACTION WILL (A) "DEPRIVE" THE COMPLAINANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE CONSTITUTION OF THE UNITED STATES, AND (B) "TAKE" THE PROPERTY OF THE COMPLAINANT WITHOUT JUST COMPENSATION, CONTRARY TO THE CONSTITUTION OF CALIFORNIA.

The Constitution of California, in Section 14 of Article I thereof, provides that:

> "Private property shall not be *taken* or damaged for public use without just compensation having first been made to or paid into court for * * * the owner."

It has been held by this court that the due process clause of the federal constitution prohibits the "taking" of private property for public use without just compensation.

Chicago Co. v. Chicago (1897), 166 U. S. 226; 41 L. ed. 979;

Norwood v. Baker (1898), 172 U. S. 269; 43 L. ed. 443.

This being so, a "taking" of private property for public use, without just compensation, will violate the provision of the California Constitution above quoted, and will also violate the "due process" clause of the federal constitution.

A. The complainant's franchise is exclusive and for this reason the proposed municipal action involves a taking of complainant's property contrary to the constitutional guaranties.

The complainant contends that its franchise is exclusive for all over five blocks. This feature of the case is discussed in a later subdivision of the brief.

Of course, if the complainant's franchise is exclusive, any action of the city which will reduce the emoluments of the franchise will "deprive" the complainant of property without due process of law.

See:

Newburyport Water Co. v. Newburyport (1900 Mass.), 103 Fed. 584 (citing many cases).

B. The operation of the municipal cars on tracks parallel to those of the complainant will, by preventing access to the complainant's cars, violate the constitutional guaranty against the "taking" of property without regard to whether complainant's franchise is exclusive or not.

Even though the franchise of the complainant is not exclusive the threatened municipal action will nevertheless "take" the property of the complainant by destroying or impairing the "property" right of access to complainant's cars which is the very life of its franchise.

> "To constitute a taking of property it is not necessary that there should be an exclusive appropriation, a total assumption of possession, or an absolute and total conversion of the entire property. One of the valuable incidents of absolute property is the right of the user. * * * Hence any serious abridgment or interruption of the common and necessary use of property may amount in law to a taking, and entitle the owner to compensation. 'A partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree. The quantum of interest may vary, but the principle is the same.' Wood's Railway Law, section 231."
>
> *Hamilton Traction Co. v. Hamilton Transit Co.* (1904), 69 Ohio St. 402; 69 N. E. 991, 994.

In *1 Lewis on Eminent Domain* (2d ed.) Sec. 56, it is said (p. 58):

> "If property, then, consists, not in tangible things themselves, but in certain rights in and

> appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be *taken*, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property, is, pro tanto, *taken*, and he is entitled to compensation."

The foregoing was quoted with approval in

Pacific Telephone Co. v. Eshleman (1913), 166 Cal. 640, 665; 137 Pac. 1119, 1127.

In the latter case the Supreme Court of California held that an order of the Railroad Commission of that State requiring a telephone company to make physical connection of its lines with those of a competitor, was a "taking" of property within the inhibition of the Federal Constitution and the Constitution of California.

In *Belleville v. Turnpike Co.* (1908), 234 Ill. 428; 84 N. E. 1049, the court speaking of the property right of a turnpike company under its franchise, says that the interest, whether denominated a franchise or an easement, is a valuable property right, the practical destruction of which would be the "taking" of property within the constitution, and also that an interference with such an interest may constitute a "taking" *pro tanto*, which will entitle the owner to compensation. Further the court says:

> "Private property forbidden by the Constitution to be taken or damaged for public use without just

> compensation is not limited to the tangible subject-matter or corpus of the property, *but includes the right of user and enjoyment of it.* When such rights are destroyed or taken for public use their owner is entitled to compensation" (84 N. E. 1051).

In *2 Tiedeman "State and Federal Control of Persons and Property"*, Sec. 143, the author says (p. 707):

> "It has been very generally held that the proprietors of adjoining property have, as an easement over the land used as a highway, the right to the free and unobstructed use of the street, and any interference with such use was a *taking* of property, for which compensation had to be made."

In many cases it has been held that "property" is *taken* when access to property is cut off or impaired. It is true that the cases are not uniform in their holding upon this subject. In some jurisdictions it is held that depriving the owner of a right of access to property is not a "taking" but a "damaging" of property. Many of the cases upon this subject are collected in a note to the case of *Ranson v. Sault Ste. Marie,* 15 L. R. A., N. S. 1, where the annotator declares that the preponderance as well as the weight of authority favors the rule that wherever a right of access to property is held to be "property" itself, the cutting off or impairment of such access is a "taking" of property. In the note on the subject the author sums up the argument in favor of the view that property is "taken" when access to it is cut off or impaired, as follows:

> "The sum of the advantages accruing from holding the title to a parcel of land makes up its value

> and this value is property, the destruction of any portion of which by actively preventing its enjoyment by physical obstruction is a *taking* of property; and, when the public needs require such destruction, there arises the condition which the Constitution was designed to prevent, the taking of private property for public benefit. It is obviously immaterial that this destruction is of the means of access to a parcel of land, because the means of access is property, and *its destruction a taking*, as surely as would be the destruction of a building on the land for some purpose necessary to the public welfare." (15 L. R. A. N. S. 56.)

In *Dana v. The Rock Creek Company* (1896), 7 App. Cas. D. C. 482, access to private property was materially impaired by the construction of a railroad. The owner claimed damages upon the ground that his property had been "taken". The court, after discussing cases arising in other jurisdictions under constitutional guaranties that property should not be "taken" or "damaged" for public use without just compensation, said (p. 496):

> " • • • under our reading of our federal constitution we are unable to perceive any reasonable or substantial distinction between the taking of private property by the actual physical invasion of it and the deprivation of the owner's use of it by acts that amount to the destruction or impairment of that use. The construction of an impassable barrier around property by which the owner's access to it would be destroyed, would, to our common understanding, be no less a taking of it in the sense of our Constitution than would be the owner's expulsion from the premises."

See, also, *Central Trust Co. v. Hennen* (1898, C. C. A. 6th), 90 Fed. 593, holding, per Clark, D. J., that if a complainant owned a right-of-way over land

> "a direct, permanent injury to, or the destruction of, such right of ingress and egress, would, to the extent of the damage actually sustained, be the *taking* of private property for public use." (p. 597)

It appeared in the case just quoted that access to private property had been cut off by the construction of a railroad, and the views of Judge Clark were concurred in by Circuit Judges Taft and Lurton.

In *Foster Lumber Co. v. Arkansas Ry. Co.* (1908), 20 Okla. 583; 95 Pac. 224, the court held that property was "taken" within the meaning of the constitutional guaranty when access to property was cut off or materially interrupted by the building of a street railroad track. In reaching this conclusion the court said:

> "The decisions of the courts made under statute or constitutional provision to the effect that the complaining party can recover only where there is a 'taking of private property for public use' are nearly uniform on the question that, where the injury complained of by the abutting property owner is one that is common to the general public, such injury is *damnum absque injuria.* The decisions of the courts, however, are by no means uniform upon what constitutes a 'taking' of property in cases similar to the one at bar, but we believe the weight of the better authorities, if not the greater in number, is that such a 'taking' may result without conversion of the property or any part thereof, as under statutes and constitutional provisions which provide that private property shall not be taken for public use without compensation." (95 Pac. 226.)

In the opinion numerous cases are cited, among others the leading case of *Pumpelly v. Green Bay Co.* (1872), 13 Wall. 166; 20 L. ed. 557, concerning which the Oklahoma court says (95 Pac. 227):

> " * * * the reasoning of the court in that case is that the test by which it may be determined whether there has been a 'taking' is not the manner in which the injury was done, but whether one's common and necessary use of his property has been seriously interrupted."

In *Pumpelly v. Green Bay Co.*, supra, in holding that property had been "taken" when the owner had been deprived of its beneficial use, this court said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." (20 L. ed. 560.)

We submit that the construction of a moving barrier on Market Street outside of the tracks of the complainant, making access to the complainant's cars always dangerous and frequently impossible, is such an impairment of the property right of access as constitutes

a "taking" of complainant's property. In so arguing we are not unmindful that in *Omaha Horse Ry. Co. v. Cable Tramway Co.* (1897, C. C. Neb.), 30 Fed. 324, it was held that the operation of street cars on tracks outside of and parallel to those of another company would not "take" the property of the first company in violation of the federal constitution, although it would "damage" that property in violation of the constitution of Nebraska. We shall deal later with the latter aspect of this case.

Nor are we unmindful of the fact that this court in *Meyer v. Richmond* (1898), 172 U. S. 82; 43 L. ed. 374, held that cutting off a right of access was not a "deprivation" of property within the meaning of the constitutional provision. The latter case, however, is not authority against our contention because it was based upon decisions of Virginia limiting the property right of abutting owners in the city streets which were held to constitute a rule of decision binding upon this court because they determined rights in property under the law of Virginia. In California, however, as we have already shown, it is clearly recognized that a right of access to property is itself "property". Necessarily, therefore, a destruction or impairment of access is a destruction or impairment of "property" so as to constitute a *deprivation* or *taking* of property.

III.

THE PROPOSED MUNICIPAL ACTION WILL "DAMAGE" THE PROPERTY OF THE COMPLAINANT WITHOUT "JUST COMPENSATION HAVING FIRST BEEN MADE" AS REQUIRED BY THE CONSTITUTION OF CALIFORNIA.

In September, 1879, when the complainant acquired its franchise on Market Street, here involved, the California Constitution of 1849 was still in force. This Constitution, prohibited the "taking" of private property for public use without just compensation. In 1879, however, California adopted a new Constitution which, in so far as it related to anything except the election of officers provided for therein, took effect on January 1, 1880 (Sec. 12, Art. XXII Cal. Const. of 1879). The new Constitution in Section 14 of Article I provided that

> "private property shall not be taken or *damaged* for public use without just compensation having *first* been made to or paid into court for the owner".

This provision has remained in force since its original enactment. On January 1, 1880, therefore, there was annexed to private property a new right, i. e., the right of immunity from "damage" except upon the payment of just compensation.

A. The constitutional provision guaranteeing immunity of private property from "damage" except upon payment of compensation was intended to create a right in private property which did not previously exist.

The reasons that led to the enactment of the provision in the California Constitution against "damaging"

of private property for public use without compensation and to the enactment of similar constitutional provisions in other states are historical and require but brief comment. They are well discussed in the leading case of *Chicago v. Taylor* (1887), 125 U. S. 98; 31 L. ed. 638. Suffice it to say, as was said in the case just cited that the purpose of the amendment was to give "greater security to private rights by giving relief in cases of hardship not covered by the preceding constitution" and that:

> "The new rule of civil conduct, introduced by the present Constitution, * * * required compensation in all cases where it appeared 'there has been some physical disturbance of a *right*, either public or private, which the plaintiff enjoys *in connection with his property*, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.'" (31 L. ed. 641.)

See, also:

Rigney v. Chicago (1882), 102 Ill. 64;

Reardon v. San Francisco (1885), 66 Cal. 492; 6 Pac. 317;

Eachus v. Los Angeles Ry. Co. (1894), 103 Cal. 614; 37 Pac. 750;

Fairchild v. Oakland Ry. Co. (1917, Cal. Sup. Ct.); 169 Pac. 388;

Williams v. Meridian Ry. Co. (1915), 110 Miss. 174; 69 So. 596;

Hot Springs Ry. Co. v. Williamson (1885), 45 Ark. 429. Affirmed 136 U.S. 121

The case last cited contains an interesting discussion of the right of an owner to access to property, the nature of that right, and the reasons that led to the enactment of constitutional provisions prohibiting the "damaging" of property without compensation.

The purpose of the constitutional amendment being to give "greater security to private rights", the amendment should be liberally construed to carry out its beneficent purpose.

In *Boyd v. U. S.* (1885), 116 U. S. 616; 29 L. ed. 746, this court, through Mr. Justice Bradley, said:

> "* * * constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." (29 L. ed. 752.)

As pointed out in the discussion of a previous proposition, the courts of the country were divided on the question whether an interference with property which did not constitute a physical invasion of it amounted to a "taking" prohibited by constitutional provisions.

The cases in which the question most frequently arose were those where the right of access to property was cut off or impaired by a public improvement. In those jurisdictions where (overlooking the fact that a right of access to property is an easement, and therefore property), it was held that a destruction or impairment of access was not a "taking" of property; the owner of property had

no remedy. It was in order to avoid this result and to make the public, generally, pay for such injuries as were inflicted upon private property in the interest of the public that the various state constitutions were amended so as to prohibit the "damaging" of property for public use without compensation. The complainant and the municipality, in operating rival lines of street railway, are serving the same public use and the complainant, by reason of its priority of right, is entitled to protection against the city, which cannot draw upon its *governmental* powers to enlarge the scope of its *proprietary* rights.

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal., S. D.); 241 Fed. 912;

and see,

Moore v. New Orleans Water-works Co., (1902, C. C. E. D. La.); 114 Fed. 380.

Whatever may be said in favor of cases that hold that property is not "taken" though access thereto is impaired or destroyed it is clear that a constitutional provision prohibiting the "damaging" of property for public use requires payment of compensation to the owner of property where right of access to his property has been cut off or impaired by a public improvement. Such is the uniform holding of the cases. In California the question has frequently arisen since the adoption of the Constitution of 1879 and invariably compensation has been awarded to the owner of the property, access to which has been obstructed or impaired.

See:

Ford v. Santa Cruz R. Co. (1881), 59 Cal. 290;

Eachus v. Los Angeles Ry. Co. (1894), 103 Cal. 614; 37 Pac. 750;

Smith v. Southern Pacific R. R. Co. (1905), 146 Cal. 164; 79 Pac. 868;

Williams v. Los Angeles Ry. Co. (1907), 150 Cal. 592; 89 Pac. 330;

Cushing-Wetmore Co. v. Gray (1907), 152 Cal. 118; 92 Pac. 70;

Coats v. Atchison Ry. Co. (1905), 1 Cal. App. 441; 82 Pac. 640;

Fairchild v. Oakland Ry. Co. (1917, Cal. Sup. Ct.); 169 Pac. 388;

Partridge v. City of Richmond (1918, Cal. App. Ct.); 172 Pac. 166.

In an earlier part of the brief quotation was made from some of the foregoing cases showing that the right of an owner to compensation for an interruption of obstruction of the right of access to his property is based upon the ground that a right of access to property is "property" itself, within the protection of the Constitution.

In numerous cases in other jurisdictions it has been held similarly that a right of access to property is "property" within the protection of a constitutional provision against "damaging" property without compensation to the owner.

See:

Vincent Bros. v. New York R. Co. (1904), 77 Conn. 431; 59 Atl. 491;

Mayor v. Wing (1901), 113 Ga. 90; 38 S. E. 392;

Mayor v. Henderson (1913), 12 Ga. App. 120; 76 S. E. 1034;

Lake Erie & Western R. Co. v. Scott (1890), 132 Ill. 429; 24 N. E. 78;

Longenecker v. Wichita Light Co. (1909), 80 Kan. 413; 102 Pac. 492;

Camden Ry. Co. v. Stein (1906), 30 Ky. L. 140; 97 S. W. 394;

Adams v. Railway Co. (1888), 39 Minn. 286; 39 N. W. 629;

Lamm v. Railway Co. (1890), 45 Minn. 71; 47 N. W. 455;

Stuhl v. Northern Ry. Co. (1917), 136 Minn, 158; 161 N. W. 501;

Slaughter v. Meridian Light Co. (1909), 95 Miss. 251; 48 So. 1040;

Morris v. Covington (1919, Miss.); 80 So. 337;

Missouri Pac. Ry. Co. v. Porter (1892), 112 Mo. 361; 20 S. W. 568;

Foudry v. St. Louis R. Co. (1908), 130 Mo. App. 104; 109 S. W. 80;

Robinson v. Springfield Ry. Co. (1910) 143 Mo. App. 270; 126 S. W. 994;

Omaha v. Kramer (1889), 25 Neb. 489; 41 N. W. 295;

Jaynes v. Omaha Ry. Co. (1898), 53 Neb. 631; 74 N. W. 67;

Stehr v. Mason City Ry. Co. (1906), 77 Neb. 641; 110 N. W. 701;

Gillespie v. So. Omaha (1907), 79 Neb. 441; 112 N. W. 582;

Crawford v. Marion (1910), 154 N. C. 73; 69 S. E. 763;

Foster Lumber Co. v. Arkansas Ry. Co. (1908), 20 Okla. 583; 95 Pac. 224;

McQuaid v. Portland Ry. Co. (1889), 18 Ore. 237; 22 Pac. 899;

Western Pennsylvania R. Co. v. Hill (1867), 56 Pa. St. 460;

Pittsburg Ry. Co. v. Vance (1887), 115 Pa. St. 325; 8 Atl. 764;

Iron City Co. v. Pittsburg (1916), 253 Pa. 478; 98 Atl. 679, 685;

Pennsylvania R. Co. v. Walsh (1889), 124 Pa. 544; 17 Atl. 186;

Block v. Salt Lake Co. (1893), 9 Utah 31; 33 Pac. 229;

State v. Superior Court (1901), 26 Wash. 278; 66 Pac. 385;

State v. Superior Court (1902), 30 Wash. 219; 70 Pac. 484;

Idaho R. Co. v. Nagle (1911 C. C. A. 9th), 184 Fed. 598;

Quinby v. Cleveland (1911 C. C. N. D. Ohio), 191 Fed. 68.

In *U. S. v. Grizzard* (1911), 219 U. S. 180; 55 L. ed. 165, part of a farm was appropriated by the federal government through permanently flooding it in the course of the construction of a public improvement. By the same improvement, a portion of the highway was also permanently flooded, thereby cutting off the access which the owner of the farm had to a turnpike. It

was held that, for the deprivation of the right of access to the turnpike, the owner of the farm was entitled to damages. Said Mr. Justice Lurton:

> "The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice." (55 L. ed. 167.)

In *Omaha v. Kramer, supra,* the court held that compensation must be paid to the owner of property whose right of access thereto was impaired by the construction of a viaduct on the street.

Said the court (p. 296):

> "It is not within the scope of the authority of the law-making department of the government to take the property of A. and give it to B., even if B. has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B. to damage or destroy the property of A. without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use, as much as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the one case, all the property is taken, while in the other it is taken only to the extent that it is

diminished in value; and in either case the owner is entitled to be compensated for his loss."

Further in the opinion the court said (p. 296):

"Constitutional guaranties are of little avail, unless carried out in the spirit in which they were framed, and no plea of public benefit should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition. If the public desire to erect works for public use, then the public—the party benefited—must bear the burden, while each owner of private property, as one of the public, in some of the modes provided by law, must pay his share of indebtedness or expense, and thus the burdens are equalized."

These cases show that under a constitutional provision against "damaging" private property without compensation the owner of property is entitled to damages whenever convenient access to his property is cut off or impaired.

B. The loss of patronage that will result to the complainant through the difficulty and danger of access to its cars by reason of the operation of the city's cars on municipal tracks between the complainant's tracks and the sidewalk is directly within the constitutional prohibition against "damaging" property without compensation "first" paid.

The evidence in the record in the present case demonstrates that the operation of the municipal cars renders access to the complainant's cars dangerous always and frequently impossible.

It will not do to say that regulations will remedy these evils as was argued by the defendants in the trial court and held by the trial judge (239 Fed. 997; R.

192). Regulations, no matter how stringent, yield to psychology. Passengers desiring to board the complainant's cars will not cross the outer tracks in front of rapidly approaching municipal cars because forsooth they know of a regulation under which the municipal cars will stop two, five or ten feet from them. They will not hazard the chance of injury particularly when from a variety of reasons such as defective brakes, slippery tracks and the negligence of motormen municipal cars may get beyond the control of "regulations". The evils and dangers to passengers consequent upon the operation of the municipal cars were recognized by the trial court as "obvious" and for this reason proof upon the subject was not multiplied as it might have been. Indeed, the subject is one of which the court will take judicial notice. It is a matter of common knowledge that the conditions which the witnesses for the complainant described will inevitably damage the complainant's franchise by *preventing* prospective passengers from boarding the complainant's cars or by *deterring* them from attempting so to do. The instinct of self-preservation will *deter* prospective passengers from crossing in front of rapidly approaching municipal cars to board the cars of the complainant. Human beings are not automatons and no amount of "regulation" will remove the fear of one who has to cross a railroad track in front of a rapidly approaching car in order to board a car of the complainant. Of this fact and of the general propensities of mankind no proof is required for this court is as much alive to them as the generality of mankind.

In *Ho Ah Kow v. Nunan* (1890, C. C. Cal.), 12 Fed. Cas. 252, Judge Field tersely and clearly expresses the principle as follows (p. 255):

> " * * * we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men."

In *Louisville Trust Co. v. Louisville Ry. Co.* (1899), 174 U. S. 674; 43 L. ed. 1130, Mr. Justice Brewer, speaking for the court, said (43 L. ed. 1134):

> "We may not shut our eyes to any facts of common knowledge,"

and again (p. 1136):

> "Human nature is something whose action can never be ignored in the courts."

The first of the observations of Justice Brewer were quoted with approval in *St. Louis Ry. Co. v. McElvain* (1918, E. D. Mo.), 253 Fed. 123, 133.

See also:

Cederberg v. Robison (1893), 100 Cal. 93, 96; 34 Pac. 625;

Butler v. Ashworth (1894), 102 Cal. 663; 36 Pac. 922.

In *Vincent Bros. v. New York R. Co.* (1904), 77 Conn. 431; 59 Atl. 491, the plaintiffs suffered a loss of patronage through an interruption of access to their property caused by a public improvement. The charter of the defendant required it to "pay all damages that may arise to any person or persons whose real estate shall be taken or *injured.*" The court held that

where premises are used for manufacturing or business purposes and "the owner is making such a use of the land, it is that use of which he is temporarily deprived, and for the loss of or injury to which he is entitled to compensation." The court therefore held:

> "In determining the diminution of such value the court should consider the reasonably necessary loss to the plaintiffs in their said business, caused by such interruption of access, including actual loss of trade and loss of profits necessarily caused thereby." (59 Atl. 496.)

In *Western Pennsylvania R. Co. v. Hill* (1857), 56 Pa. St. 460, the defendant company constructed its road through lands of Hill and condemned a right-of-way therefor.

The trial court included in the award of damage an item for loss of business to a mill due to the danger to customers because of the proximity of the railroad. The defendant appealed. The question in the case is thus stated in the opinion of the Supreme Court of Pennsylvania:

> "Many witnesses testified that the plaintiffs owned an ancient custom mill; that after the railroad was built and begun to be operated, they ceased to carry their grain to be ground there, and that at least one-half of their custom had fallen off. The reason given for this was simply the danger in going to the mill with horses and teams, owing to the location of the railroad with reference to the mill. * * *
>
> In the opinion of the witnesses this presented a case of such peril and inconvenience in frightening teams and horses, as to compel them and others to carry their grain to be ground at other mills. If this resulted as an immediate and direct

consequence of the taking of the plaintiffs' property, on which to build the railroad, and if the fear and danger in the circumstances of the case were reasonable, and prevented people from coming to the mill, the court advised the jury that the depreciation in the value of the property, therefore, ought to be compensated by the railroad company." (p. 464.)

In affirming the judgment of the trial court, the Supreme Court of Pennsylvania said:

"It is not necessary to elaborate much the nature of the injury here, or its direct character. It results solely from the taking a portion of the plaintiffs' land, and the construction and use of the defendants' road. I see not much difference in the nature and certainty of the exclusion of the customers of this mill, between an absolute physical obstruction, directly in their way, and others which continually threaten their lives and limbs in the use of the ordinary means of getting there. Without enlarging, however, we think the testimony in regard to the loss of custom to the mill, from the construction of the road over the ground of the owner, and the reason for it, were properly received and properly submitted to the jury as grounds of compensation to be made to the plaintiffs, for the deterioration of their property." (p. 465.)

A similar case is *Pittsburgh Ry. Co. v. Vance* (1887), 115 Pa. St. 325; 8 Atl. 764, dealing with the propriety of an award of damages for loss of patronage due to danger of access to a mill. Says the court:

"The court was clearly correct, however, in admitting evidence to show how the trade or custom of the mill was affected by the construction of the railroad; that, by reason of the proximity of the railroad to the mill, it was inconvenient and dangerous for persons with teams and wagons going

to and from it; and that the effect of this was to decrease or to destroy the business and custom of the mill, and consequently to lessen its value. If the peril and inconvenience to customers from this cause was such that they were thereby induced to carry their grain to be ground to other mills, and the plaintiff's land was thereby depreciated, the taking of the plaintiff's property, and the construction of the railroad thereon, were the direct and immediate cause of this injury." (8 Atl. 767.)

To the same effect see:

Pennsylvania R. Co. v. Walsh (1889), 124 Pa. 544; 17 Atl. 186;

Iron City Co. v. Pittsburgh (1916), 253 Pa. St. 478; 98 Atl. 679.

In *Foudry v. St. Louis Ry. Co.* (1908), 130 Mo. App. 104; 109 S. W. 80, the plaintiff was the owner of property abutting on a street and sought an injunction and damages against the defendant because of the construction of a railroad in the street which she claimed would cut off access to her property. The holding of the court, in so far as pertinent here, is summarized in two of the syllabi as follows:

"A railway in a street is unlawful if it prevents the use of the street for traffic and travel or prevents access to private property, since access is in itself a property right."

"In determining whether a railway company's tracks interfere with travel and traffic on a street so as to warrant an injunction, the population and business volume of the city, proximity and convenience of other streets, and environments should be considered, and, while even a considerable hindrance or inconvenience to travel and traffic will not necessarily make the occupation of a street by

> a railway company unlawful, the monopoly of the street by the company need not go to the extent of rendering passage by teams and vehicles impossible, and if the tracks so far engross a street that the public will forego the use of it rather than encounter the danger and difficulty of using it, injunction will lie."

In the opinion it is said:

> "The tracks must not so far engross a street that the public will forego the use of it rather than encounter the danger and difficulty of using it." (109 S. W. 83.)

The matter just quoted sums up pithily the argument of the complainant in this connection. If access to the complainant's cars is made so dangerous by the operation of the municipal cars that prospective passengers will "forego the use" of complainant's cars "rather than encounter the danger and difficulty of using" them, the complainant is entitled to damages for the loss of patronage so caused.

With respect to the "damage" that will be caused by the danger from municipal cars and the consequent deterring of prospective passengers of the complainant, see:

> *Allentown Turnpike Co. v. Lehigh Valley Traction Co.* (1896), 174 Pa. St. 273; 34 Atl. 565.

In this case the railway company entered upon and used a part of the road of the Turnpike Company by laying a double track and running its cars thereon. This use was subject to a statutory duty to make compensation therefor to the owners of the turnpike. The parties, however, were unable to agree as to the amount

of the compensation and a jury was appointed to assess the damages. From the award of the jury an appeal was taken to the Court of Common Pleas and thereafter to the Supreme Court upon exceptions to the rulings of the former court with respect to the measure of damages. The contentions of the parties are thus stated in the opinion:

> "The defendant's contention is that it is liable only for the damage caused by the laying of the tracks, and not for the loss of profits resulting from the diminution of tolls, and that the full measure of damages is the additional expense which the plaintiff has incurred, or may hereafter incur, in keeping its roadway in repair by reason of the tracks being laid upon it. The contention of the plaintiffs is that it is entitled to recover compensation for all losses which are the direct and immediate result of the act of the defendant in taking possession of a portion of the road, and laying its tracks and running its cars thereon, and that the measure of damages is the difference in value of the property of the turnpike company, as a whole, before and after the construction of the railway." (34 Atl. 565.)

The judge of the Court of Common Pleas adopted substantially the plaintiff's view, excluding, however, from the computation of damages the loss of revenue due to the *mere competition* of the railroad company.

In the opinion of the Supreme Court it is said:

> "The compensation secured by the act is compensation for the occupation and use of the property of the turnpike company by the railway company, and it includes all injury done to the property which is the immediate and direct consequence of the occupation and use. The damage is not measured by the additional cost of maintenance of

> the roadway only, but by the depreciation in value of the property as a whole, resulting from the occupation and use, and caused by the presence of the tracks and cars. *If these were such a menace to travel as to cause those who would otherwise have driven on the road to abandon its use in whole or in part, they directly affected its earning capacity, diminished its revenue, and depreciated its value as a property.*" (34 Atl. 566.)

The foregoing language is quite pertinent in the present case. Paraphrasing the last sentence quoted above, it can truly be said that municipal cars operating on tracks interposed between the complainant's tracks and the sidewalk will be "such a menace to travel as to cause those who would otherwise have ridden on the complainant's cars to cease to do so wholly or partly, thereby directly affecting their earning capacity, diminishing their revenue and depreciating their value as a property".

A case precisely similar to the present case is

> *Omaha Horse Ry. Co. v. Cable Tramway Co.* (1887, C. C. Neb. per Brewer C. J.), 30 Fed. 324.

The facts of the case briefly stated were as follows:

A *horse car* company, claiming to have an *exclusive* franchise in the City of Omaha, sought in the federal court for the district of Nebraska to enjoin a *cable* company, which was laying tracks parallel to those of the horse car company. It was claimed by the complainant that (1) it had an *exclusive* franchise, the obligation of which would be impaired by the proposed cable line; (2) such franchise would be "taken" by the proposed cable

line contrary to law; and (3) the proposed cable line would *"damage"* such franchise without compensation, contrary to the provisions of the Constitution of the State of Nebraska.

The cause was heard by the late Mr. Justice Brewer, then circuit judge, and is reported twice, first in 30 Fed. at page 324; secondly, in 32 Fed. at page 727.

The first volume reports the decision of the court upon final hearing. The court held that the plaintiff did not have an *exclusive* franchise *except for the operation of horse* cars. It further held that such franchise would not be "taken" *in the constitutional sense* by the operation of the proposed cable line. It did hold, however, that the plaintiff's franchise would be "damaged" by the proposed cable line and particularly by the proposed manner of operation on tracks outside of and parallel to the tracks of the plaintiff. Accordingly commissioners were appointed by the court to assess the damages that would result to the complainant. In making this reference, Judge Brewer said:

> "I do not mean that the plaintiff is entitled to compensation for any injury which may result from *the mere fact of competition,* but there are at least two matters which are clearly proper matters of consideration in estimating the plaintiff's damage: First, the inconvenience and annoyance which results from the crossing of the plaintiff's tracks by the track of the defendant; second, *the interruption of access to plaintiff's cars by the track and cars of defendant between its tracks and the sidewalk."* (30 Fed. 332.)

> *the ordinary passage-way of foot passengers, impairs more or less access to plaintiff's cars. It is a direct hindrance and injury to accessibility thereto. Why should this hindrance and injury be not a legitimate element of damages, upon the same principle that controls in the illustrations cited? That a right is given defendant to lay its track does not destroy the fact of the injury, does not deprive plaintiff of a right to compensation, any more than the right acquired by the railroad company to construct its track in the cases cited.* If it be said that running a line of omnibuses would operate in the same way, I reply that that is an ordinary use of the streets, open to all, and requiring no special permission; there is no appropriation to any public use; it is only a matter of increased travel. But a railroad track is a new use; perhaps not such a one as requires compensation to the adjoining lot-owners, but one special, not free to all, and acquired only through the direct assent of the public authorities" (32 Fed. 733).*

As held by Judge Brewer in the case just reviewed, the operation of cars on tracks between the sidewalk and the tracks of another railroad, is bound to interfere with the exercise of the latter's franchise; it is inevitable that ingress and egress to and from its cars be interfered with. Necessarily, therefore, the operation

* Both parties appealed to this court from the final decree. Later, however, both appeals were dismissed upon stipulation.
See:
Omaha Horse Ry. Co. v. Cable Tramway Co. (1890), 140 U. S. 674; 35 L. ed. 600;
Cable Tramway Co. v. Omaha Horse Ry. Co. (1890), 140 U. S. 692; 35 L. ed. 600.

In the interim between the final decree and the dismissal of the appeals therefrom, the complainant filed a supplemental bill seeking additional damages. A demurrer to this bill was sustained for want of jurisdiction.
See:
Omaha Horse Ry. Co. v. Cable Tramway Co. (1888, C. C. Neb.), 33 Fed. 689. The litigation terminated with the dismissal of the appeals from the final decree.

of cars in such manner "damages" the franchise of the railroad operating on the inner tracks.

In many cases the principle has been recognized that the construction of a public work *longitudinally* along the right-of-way of a railroad must inevitably interfere with the operation of the railroad. Even in jurisdictions where it is held that a street-crossing constructed *across* a railroad right-of-way does not increase the burden on the right-of-way, or create an additional servitude thereon as to entitle the railroad to *substantial* damages, it has nevertheless been held that the opening of a street *longitudinally* along the right-of-way does necessarily increase the burden of the right-of-way and interfere with the operation of the railroad so as to require an award of substantial damages to the railroad company.

See:

Los Angeles v. Allen (1917), 32 Cal. App. 553; 163 Pac. 697;

Los Angeles v. Zeller (1917), 176 Cal. 194; 167 Pac. 849.

The interference with access to the complainant's cars which will result from the operation of the municipal cars stands upon a different footing from the interference with access that arises from ordinary vehicular travel upon the street. The authorities make a clear distinction between the exercise of those privileges which are of common right, such as the use of city streets by pedestrians and private vehicles, and the use of the street by a street railroad. The latter use of a street is

not enjoyed as of right but requires a sovereign grant to make it lawful.

See:

McPhee v. Union Pacific R. Co. (1907, C. C. A. 8th), 158 Fed. 5;

Elizabeth v. Banks (1909), 150 N. C. 407; 64 S. E. 189.

See, also, for this distinction:

Omaha Horse Ry. Co. v. Cable Tramway Co. (1887, C. C. Neb.), 32 Fed. 727, 732 (quoted supra).

As further illustrating this distinction, see:

Tidewater Ry. Co. v. Shartzer (1907), 107 Va. 562; 59 S. E. 407.

The case last cited was a condemnation suit. The particular question involved was whether the "damages", which a public service corporation exercising eminent domain was required to pay under a constitutional provision against the "damaging" of property without compensation, were limited to that class of damage for which a private individual would be liable in the use of his own property. In holding that such was not the measure of damages, the court said (p. 409):

> "It is contended on the part of plaintiff in error that 'the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words "or damaged" mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be

caused by the physical invasion of property or an interference with some right, public or private appurtenant to the property.'

"To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally, but more accurately, perhaps, 'so use your own property as not to injure the rights of another.' Broom's Leg. Max. (7th Ed.), p. 364.

"But in the case before us the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its 'inability to agree on terms of purchase with those entitled' to the land it desired, and therefore had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised."

To the same effect see:

Omaha v. Kramer (1889), 25 Neb. 492; 41 N. W. 295;

Lake Erie Co. v. Scott (1890), 132 Ill. 429; 24 N. E. 78.

In the latter case the court said:

"* * * appellant's proposition that 'a corporation is not liable unless an individual doing the same thing on his private property would be' as applied to this case, is not sound. An individual cannot legally take or damage private property for public use, but a railroad company can lawfully do either, if in so doing it makes compensation."

To the same effect is:

Woodbury v. Beverly (1891), 153 Mass. 245; 26 N. E. 851.

The distinction expressed by the foregoing authorities is that between the exercise of a *private* right and the operation of a public utility. A person exercising a *private* right is not liable for mere consequential damages which result to another from the exercise of that right. Such also was the rule in many cases in respect of public rights prior to the enactment of constitutional provisions prohibiting the "damaging" of private property for public use without compensation. Since the inclusion of such provisions in the state constitutions a public or quasi-public corporation exercising a public right is liable to a private individual for consequential damage caused by the exercise of the public right.

See again:

Chicago v. Taylor (1888), 125 U. S. 161; 31 L. ed. 638;

Mason City R. Co. v. Wolf (1906, C. C. A. 8th), 148 Fed. 961.

A constitutional provision prohibiting the "damaging" of private property for public use

> "means to cover cases where damages are caused by acts that are legal and entirely within the powers of the corporation performing them, but in the doing of which, for the benefit of the public, private property is damaged."
>
> *Lake Erie R. Co. v. Scott* (1890), 132 Ill. 429; 24 N. E. 78.

IV.

THE COMPLAINANT'S FRANCHISE IS EXCLUSIVE FOR ALL EXCEEDING FIVE BLOCKS ON ANY STREET INCLUDED IN ITS FRANCHISE AND THE OPERATION OF MUNICIPAL CARS FOR MORE THAN FIVE BLOCKS ON ANY SUCH STREET WILL VIOLATE COMPLAINANT'S FRANCHISE.

We now purpose to show that the complainant's franchise is exclusive for all in excess of five blocks on any street covered thereby.

A. The franchise of the complainant, by express provision, prohibits the city from operating a railroad for more than five blocks on any street covered by the complainant's franchise.

The franchise here involved provides as follows:

> "Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation and no more the right to use either of the aforesaid streets for a distance of five blocks and no more, *upon the terms and conditions specified in the 499th section of the Civil Code of this state. This section shall apply to persons and companies as well as corporations*" (R. 23).

Section 499 of the Civil Code of California, referred to in the franchise, in 1879, provided as follows:

> "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

It will be noted that the franchise incorporated by reference the provisions of Section 499 of the Civil

Code. The City of San Francisco bound itself not to allow another street railroad for more than five blocks on any street covered by the complainant's franchise. The provision of the franchise is broad. It is directed against corporations, companies and individuals. The city directed the prohibition against every person, natural and corporate. We believe and shall later argue that without express inclusion in the franchise of the complainant the statute itself would have insured to the complainant rights which would be, *pro tanto*, exclusive. The city, in granting the complainant's franchise, made assurance doubly sure by *expressly* incorporating the statutory provisions. The city provided that it should be "lawful for the Board of Supervisors" to permit a second street railroad upon the same street for five blocks. This necessarily meant that it would be *unlawful* for the Board of Supervisors to permit a second railroad for more than five blocks.

The city, therefore, covenanted with the complainant that it would not permit a second railroad upon the streets covered by the complainant's franchise except for five blocks.

In the trial court the defendants contended and the trial court held that the term "corporation" in the franchise did not include a "municipal corporation" (Record 189; 239 Fed. 993). It is clear, however, that the term in the franchise was intended to mean precisely what was meant by the same term in the statute since the franchise expressly incorporated the provisions of the statute. We shall later show that the term "railroad corporations" in the statute includes

and was meant to include a municipal corporation operating a street railroad. In this connection we shall have occasion later to analyze the case of *Knoxville Water Co. v. Knoxville* (1906), 200 U. S. 22; 50 L. ed. 353, relied upon by the defendants. At the moment, however, it should be observed that the city in its franchise was careful to covenant against permitting the existence of a second street railroad owned by "persons" or "companies" or "corporations". It is evident that the city's purpose was to prohibit a second railroad for more than five blocks without regard to the ownership. The provisions of the franchise were directed against the existence of a second road. The important thing was the prohibition of two street railroads on the same street for more than five blocks and not the personality of the owner of the second railroad. We submit, therefore, that under the above-quoted provision of its franchise the complainant acquired rights in the city streets which were *pro tanto* exclusive and which will be violated by the operation of municipal cars on those streets *for more than five blocks.*

See:

Brewster v. Kitchell, 1 Salk 198; 91 Eng. Rep. 177; 1 Lord Raymond 317, 91 Eng. Rep. 1108;
Newington Local Board v. Cottingham (1879), L. R. 12 Ch. Div. 726.

In the latter case the court says (p. 731):

> "Although the authority is old, the doctrine cannot be better put than it is in Brewster v. Kitchell (1). 'Where the question is whether a covenant be repealed by Act of Parliament, this is the difference, viz: where H. covenants not to do an act

> or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant; so if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an Act comes in and makes it lawful to do it, such Act of Parliament does not repeal the covenant."

See, also:

Shipton Arbitration (1915), L. R. 3 K. B. 676, 683.

In *Presbyterian Church v. New York* (1826), 5 Cow. 538, the doctrine is thus expressed (p. 540):

> "If a man covenants not to do a thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the covenant."

B. The provisions of Section 499 of the Civil Code as that section existed in 1879 entered into and became a part of the complainant's franchise insuring to the complainant an exclusive franchise for all exceeding five blocks.

At the time that the complainant acquired its franchise, Section 499 of the Civil Code, which is expressly incorporated in the franchise, provided as follows:

> "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

This statute in all its terms became a part of the franchise of the complainant.*

*(In an Appendix hereto we have collected all the California statutory and constitutional provisions upon which the defendants rely to justify the construction and operation of a proposed municipal line paralleling the tracks of the complainant for twenty-one blocks.)

In *U. S. v. City of Quincy* (1867), 71 U. S. 535; 18 L. ed. 403, it is said (18 L. ed. 408):

> "It is * * * settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

To the same effect see:

Denver v. New York Trust Company (1913), 229 U. S. 123; 57 L. ed 1101, 1122;

Commissioners v. King (1869), 13 Fla. 451, 474-475;

State v. Tampa Waterworks Co. (1908), 56 Fla. 858; 47 So. 358.

The rule is thus stated by a learned writer on municipal corporations:

> "In construing a contract contained in a franchise, the provisions of a statute relating to such franchises must be considered as a part of the contract, and provisions of the constitution or statutes are as much a part of any contract between the municipality and the corporation as if they had been written into the contract."
>
> 4 *McQuillan Municipal Corporations,* Sec. 1721, p. 3678.

The rule has been frequently announced in California, and particularly in respect of the provisions of the Civil Code dealing with street railroads.

See:

Los Angeles Railway Company v. Los Angeles (1907), 152 Cal. 242; 92 Pac. 49,

holding that the provisions of Section 502 of the Civil

Code enter into and become a part of all street railway franchises.

See, also:

St. Helena v. San Francisco Ry. Co. (1914), 24 Cal. App. 71; 140 Pac. 600,

holding in like manner with respect to the provisions of Section 498 of the Civil Code.

It is hardly necessary to add that provisions of a contract which become a part of it through implication are as much protected against impairment, amendment or repeal as are provisions expressly set forth in the contract.

See:

U. S. v. City of Quincy, supra.

In *Cochise County v. Ritter* (1890), 3 Ariz. 208; 73 Pac. 448, it is said (p. 449):

> "It is to be remembered that the statute in force at the time a bond is given becomes a part of the contract as much so as if recited in the bond in precise terms. Any subsequent act of the Legislature cannot vary the contract or change the liability or increase the obligation of the sureties without their consent. To hold otherwise would be to hold that the Legislature may by act impair the obligation of a contract."

See, also:

Creighton v. Pragg (1862), 21 Cal. 115;

Blair v. Chicago (1906), 201 U. S. 400; 50 L. ed. 801;

In *Pocatello v. Murray* (1912), 21 Idaho 180; 120 Pac. 812, speaking of a water franchise granted to the defendant, it is said (120 Pac. 817):

> "The foregoing provisions of the Constitution were as much a part of Murray's contract with the City of Pocatello as if they had been written bodily into the contract. The ordinance of the city could not abrogate them and should be read in the light of and subject to the supreme law of the State."

The defendants contend that the provisions of the statute did not enter into the obligation of complainant's franchise for many reasons. All of the contentions of the defendants in this respect are dealt with fully in a later subdivision of this brief. The principal contention of the defendants is that the terms "railroad corporation" in Section 499 do not include a municipal corporation operating a street railroad. This contention is based upon the case of *Knoxville Water Co. v. Knoxville*, supra, and the other cases, state and federal, which follow the *Knoxville* case. We believe, however, for many reasons hereinafter given that the *Knoxville* case does not cover the question here involved. The question here, in so far as it involves the construction of the code section is whether a municipal corporation, exercising *proprietary* powers, is subject to the general laws of the state. The *Knoxville* case involved no such question.

V.

THE PLANS OF THE MUNICIPALITY FOR CROSSING THE TRACKS OF THE COMPLAINANT WITHOUT FIRST MAKING COMPENSATION INVOLVE AN IMPAIRMENT OF THE GRANT CONTAINED IN THE FRANCHISE AND GIVE RISE TO BOTH A "TAKING" AND A "DAMAGING" OF PROPERTY WITHOUT JUST COMPENSATION.

Heretofore we have dealt only with the feature of the plans of the municipality which involve the paralleling of our tracks. We come now to the proposed cutting and crossing thereof.

A. The crossing of the complainant's tracks by the municipal tracks without payment of compensation will deprive the complainant of property by appropriating pro tanto the easement of the complainant in the portion of the street between its tracks.

The defendants purpose to cut the rails and cross the tracks of the complainant at various street intersections without payment of compensation. If, as previously shown, the complainant has an easement and exclusive right for street railway purposes in the portion of the street occupied by its tracks, it would seem necessarily to follow that any crossing of those tracks by the city would be a *pro tanto* appropriation of the exclusive easement lawful only upon payment of compensation. Such is the law of California, and such is the holding of the cases elsewhere.

In *Georgia R. Co. v. Columbus Co.* (1892), 89 Ga. 205; 15 S. E. 305, the syllabus thus states the principle:

> "Without first making compensation for the damages which will result therefrom one railway

company cannot lay and use its track across the track of another railway company, located in a public street of a city."

In *Chicago R. R. Co. v. Chicago & St. Louis R. R. Co.* (1884), 15 Ill. App. 587, the syllabus reads as follows:

"The construction of a railroad track across a street upon which another railroad has its track, though built on the same grade, *is a taking of the latter's property for public use within the meaning of the constitution, and the latter is entitled to have the construction enjoined until compensation is made.*"

In the opinion it is said (p. 592):

"It seems clear that the construction of another railroad across that of the complainant, though built on the same grade, is a taking of the complainant's property for public use, within the meaning of the constitution. It necessitates an interference with the track and road bed of the complainant's road, which does not come within the proper and ordinary use of the street as a highway, and which will necessarily, to some extent at least, impair the beneficial enjoyment of the complainant's easement. Before this can be permitted, the damages to the complainant's property rights must be ascertained and compensation made."

In *Birmingham Traction Co. v. Birmingham Ry. Co.* (1898), 119 Ala. 129; 24 So. 368, the syllabus, fully borne out by the opinion, is as follows:

"A railroad company, in possession of and owning a right of way, has such property rights and interest that *the crossing of it by another railroad company is the taking of property* within the laws and constitutional provisions requiring just compensation to be paid to the owner before such taking."

See, also:

Memphis Co. v. Birmingham Co. (1892), 96 Ala. 571; 11 So. 642.

The principle declared in the foregoing cases is recognized and applied in the statutes of California.

Section 500 of the Civil Code of California provides as follows:

> "Any proposed railroad track may be permitted to cross any track already constructed, *the crossing being made as provided in chapter two, title three, of this part.* In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days."

In "chapter two, title three" referred to in Section 500 supra, appears Section 469 of the Civil Code, which reads as follows:

> "Whenever the track of one railroad intersects or crosses the track of another railroad, *whether the same be a street railroad,* wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible; *and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under title seven, part three, Code of Civil Procedure, and the damages assessed and the right of way granted as in other cases.*"

"Title seven, part three" of the Code of Civil Procedure mentioned in Section 469 is the title of the Code of Civil Procedure dealing with eminent domain.

It is clear, therefore, that in California one street railroad may cross the tracks of another only upon paying for the easement thus appropriated.

B. The damage which will result from a crossing of the complainant's tracks by municipal tracks and the operation of municipal cars across the complainant's tracks constitute such "damage" as under the Constitution of California must be paid to the complainant.

In *Lake Shore Ry. Co. v. Chicago R. R. Co.* (1881), 100 Ill. 21, the court was considering the right of a railway company to damages caused by the crossing of its tracks by the tracks of another railroad. The right was predicated upon the provision of the Illinois constitution prohibiting the "damaging" of private property for public use. The Supreme Court of Illinois in holding that the railroad company whose line was crossed was entitled to damages, said (p. 32):

> "We think it was competent to show, as was attempted, and to recover for, damages to which the companies would be subjected by placing obstructions upon their right of way, whereby access to different parts of their lines would be interfered with, and their capacity for the transaction of business impaired or destroyed."

In *Chicago R. R. Co. v. Englewood Ry. Co.* (1886), 115 Ill. 375; 4 N. E. 246, the syllabi, which are a true index to the decision, read as follows:

> "In a proceeding by one railway company seeking to condemn a right of way across the tracks of another company, notwithstanding the petitioner stipulates to put down at its own expense, and keep in good repair, all necessary frogs and crossings for its main tracks across the tracks of the

other company, the defendant company, on the assessment of the damages to be paid, has the right to show to the jury that the value of its road, and its capacity to do business, will be impaired by the proposed crossing, and it is error to exclude such evidence.

"In such case the company seeking to obtain the right of way is liable for all damages directly resulting to the defendant company from the making or using of the crossing, whereby the value of its property is diminished, or its facilities are materially impaired for the transaction of its business. If the inconvenience or hindrance resulting from such crossings or other structures abridges the owner's capacity to transact an equal volume of business, it is an element of damages, even though it does not increase his expenses."

In the opinion it is said (p. 385):

"Suppose the business of a railway company requires it to use a particular part of its road all the time, so that it could not stop without greatly deranging its business and subjecting it to serious pecuniary losses. Now if, under these circumstances, a new company should be organized, and propose to run a number of tracks across that part of the old company's line in constant use, and to conduct such a business on the new road as would occupy the crossing half the time, and consequently reduce the capacity of that part of the old company's road just one-half, can it be doubted this would be an invasion of the right of property for which, under the constitution of the State, compensation would have to be made? It is manifest that the value of a railroad property, outside of advantages of location and amount of business it controls, consists in the strength, permanency and durability of its structures, and its adaptability to, and capacity for doing railroad business. The conclusion would therefore seem irresistible, that whenever the proposed condemna-

> tion and subsequent user will injuriously affect such a property in either of these respects, the injury thus occasioned will form a proper basis for the assessment of damages in a proceeding of this kind."

In *Chicago Railroad v. Chicago & St. Louis R. R. Co.* (1884), 15 Ill. App. 587, the court, speaking of the damage that would result to a railroad company whose tracks were crossed by another company, said (p. 593):

> "• • • It necessitates an interference with the track and roadbed of the complainant's road, which does not come within the proper and ordinary use of the street as a highway, and which will necessarily, to some extent at least, impair the beneficial enjoyment of the complainant's easement. Before this can be permitted, the damages to the complainant's property rights must be ascertained and compensation made."

See, also:

Georgia R. Co. v. Columbus Co. (1892), 89 Ga. 205; 15 S. E. 305;

Memphis R. Co. v. Birmingham Ry. Co. (1892), 96 Ala. 571; 11 So. 642;

Birmingham Traction Co. v. Birmingham Ry. Co. (1898), 119 Ala. 129; 24 So. 368;

Mobile R. Co. v. Louisville Co (1915), 192 Ala. 136; 68 So. 905.

And see, again:

Omaha Horse Ry. Co. v. Cable Tramway Co. (1887, C. C. Neb.), 30 Fed. 324, 332, and same case 32 Fed. 727,

holding that:

> "the inconvenience and annoyance which results from the crossing of plaintiff's tracks by the track of the defendant"

is such a damage for which compensation must be paid under a constitutional provision prohibiting the "damaging" of private property for public use without compensation.

VI.

THE MUNICIPALITY HAS NOT SOLICITED AND CONSIDERED OFFERS FOR THE SALE TO THE CITY AND COUNTY OF THE LINES OF THE COMPLAINANT AND HAS, THEREFORE, NOT COMPLIED WITH THE PROVISIONS OF SECTION 2 OF ARTICLE XII OF THE CHARTER, COMPLIANCE WITH WHICH IS A CONDITION PRECEDENT TO THE ACQUISITION OF A PUBLIC UTILITY.

Article XII of the Charter of San Francisco is entitled "Acquisition of Public Utilities." Its preamble or opening paragraph reads as follows:

> "It is hereby declared to be the purpose and intention of the People of the City and County that its public utilities shall be *gradually acquired* and *ultimately owned* by the City and County. To this end it is hereby ordained:"

Then follow sixteen sections setting forth a complete scheme for the acquisition of public utilities by purchase, condemnation, or original construction.

Section 2 of said article provides:

> "Before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities the Board of Supervisors must solicit and consider offers for the sale

> to the City and County of existing utilities in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

By the clear and explicit language of the preamble it is declared to be the purpose and intention of the people of the city and county to *gradually* acquire and *ultimately* own its public utilities. It is therefore not the purpose of the city and county to acquire *all* of its public utilities *at once*. Moreover, the city and county has never attempted to do so, and has never initiated any proceedings looking to the acquisition by purchase of *all* of the street railroads operated in the city and county.

On August 26, 1913, a special election was held to vote upon the proposition of incurring a bonded indebtedness for the construction of a street railroad "on Van Ness Avenue and from said avenue along connecting streets to Church Street and along Church Street to convenient terminals" (R. 89).

Preliminary to submitting this proposition to a vote of the people a resolution was adopted by the Board of Supervisors providing, among other things, that—

> "The Board of Supervisors of the city and county of San Francisco does hereby solicit offers for the sale to the city and county of San Francisco of *any* existing street railway or system of street railways *operated over or upon ANY street* within said city and county" (R. 173).

The resolution further called for proposals or offers in writing from the owner or owners of any

such street railway or systems of street railways, such proposal to be filed prior to the 2nd day of June, 1913.

Said resolution further provided:

> "And it is hereby announced and declared to be the purpose and intention of the Board of Supervisors to consider any and all proposals or offers that may be made for the sale of *any* street railway or system of street railways to the said city and county on said 2nd day of June, 1913, and before submitting propositions to the electors for the acquisition by original construction or condemnation of such railways or systems of street railways in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof" (R. 173).

The resolution then directs that notices soliciting offers be sent to the Presidio and Ferries Railway Company, the California Railway Company and United Rail*ways* of San Francisco.

This resolution was adopted as a preliminary to the submission to the people of the proposed bond indebtedness to provide funds for the acquisition or construction of the new railroad "on Van Ness Avenue and from such avenue along connecting streets to Church Street and along Church Street to convenient terminals" (R. 89).

This is the only resolution or ordinance adopted by the city and county soliciting offers as required by Section 2, Article XII of the Charter, quoted above.

It is the contention of complainant that this resolution does not comply either with the letter or spirit of the charter and is therefore a nullity.

As before observed, it is the purpose and intention of the people of the city and county to *gradually* acquire and *ultimately* own its public utilities. In order to accomplish this purpose, Section 2 of Article XII of the Charter requires that the Board of Supervisors must solicit and consider offers for the sale to the city and county of San Francisco of existing utilities "before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities."

The resolution above mentioned was passed in connection with and as a part of the proposed bonded indebtedness which was approved at the election of August 26, 1913.

The proposition submitted to the people did not specifically provide for any line of street railway on any part of Market Street. It provided for the construction of a street railroad "on Van Ness Avenue and from said Van Ness Avenue along *connecting streets* to Church Street and along Church Street to convenient terminals." There are other connecting streets between Van Ness Avenue and Church Street, and Market Street had not then been selected as the route for the connecting line between Church Street and Van Ness avenue.

With respect to the proposed route on Market Street between Kearney Street and Van Ness Avenue

and between Church Street and 17th Street no proposition for a bond issue was ever submitted to the people. Construction of a street railway on that part of Market Street was not contemplated or determined upon by the city until the passage of the ordinance of May 16, 1916 (R. 152).

By this ordinance the proposed new construction is characterized as "an *extension of* the Municipal Railway system along Market Street from the easterly portal of Twin Peaks Tunnel to Church Street and from Van Ness Avenue to existing municipal railway tracks in Market Street at Kearny Street" (R. 152).

The city contends that it has authority to construct "extensions" out of funds derived from the operation of other public utilities, under Section 16 of Article XII of the Charter, which reads as follows:

> Section 16. 1. "Whenever any public utility shall be operated by the city and county, the receipts from such utility shall be paid daily into the city treasury, and maintained in a special fund set aside for such utility. The Supervisors may, from time to time, make appropriations from such funds for the following purposes: * * * (d) for extensions and improvements. * * *"

The proposed construction, therefore, on Market Street between Van Ness Avenue and Church Street was authorized by the bond issue approved at the election of August 26, 1913, in connection with which the resolution soliciting offers of *all* the street railways in San Francisco was adoped. The proposed construction on Market Street between Kearny Street and Van Ness Avenue, and between Church Street and 17th

Street, on the other hand, is not supported by any bond issue but must be regarded merely as an "*extension.*" No resolution soliciting offers for the sale to the city of the existing utility on that part of Market Street was ever adopted unless the blanket resolution adopted more than three years before the ordinance of May 16, 1916, can be so regarded.

It is complainant's contention, therefore, that Section 2 of Article XII of the Charter has never been complied with by the city with respect to any part of Market Street. At the time the blanket resolution soliciting offers was adopted there was no proposition afoot for the construction of any street railway on Market Street. The proposition then submitted to the people did not mention Market Street. It was not brought home to the complainant that the city intended to "originally construct" a street railroad on Market Street, or that it desired to purchase the street railway of complainant on Market Street between Van Ness Avenue and Church Street. The omnibus resolution applying generally not only to the entire system of complainant but to the systems of other operating street railroad companies as well does not, either in letter or spirit comply with the purpose and intention of the Charter. Such purpose was to gradually acquire and ultimately own all street railways, and the spirit of the Charter provisions requires that as the city contemplated acquiring a street railway on any particular street it should solicit offers for the sale of any existing railway on that particular street before proceeding to construct its own street railway thereon.

With respect to the proposed construction on the remainder of Market Street the city and county never

solicited any offers at all. The omnibus resolution passed more than three years before such construction was decided upon cannot be considered as a bona fide request for an offer to sell complainant's lines on Market Street to the city. The Board of Supervisors proceeded ruthlessly and without regard for the provisions of the Charter, to *originally construct* a new street railroad on that part of Market Street, and the city and county is now persisting in such construction in violation of the provisions of the Charter and without regard to the consequences of such a proceeding upon the property rights of complainant.

As declared by Section 2 of Article XII the purpose of soliciting offers for existing utilities is that "the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

The charter makers had some thought for the rights of street railway owners already operating on the streets of the city and county. An opportunity was intended to be given them to sell their street railways to the city for a fair price. The city and county was required to negotiate with them before proceeding to original construction. This procedure was deemed equitable because it would enable the company already operating to sell its street railway at a fair price and it might enable the city and county to acquire an existing public utility at a cost lower than original construction.

These provisions of the Charter have been ignored by the city and county, and it is now proposed, without soliciting offers for the purchase of the Market Street system and without giving the complainant an opportunity to sell at a fair price, and without giving the

city and county an opportunity to acquire the existing railways "at the lowest possible cost thereof" to construct an entirely new street railway system outside of the present existing tracks, a proceeding which will render valueless complainant's franchise rights on Market Street, and irreparably injure and damage the valuable business it has built up and now possesses thereon.

It is most respectfully submitted, therefore, that the proposed construction is in violation of the letter and spirit of the Charter.

VII.

THE CLAIM OF THE DEFENDANTS THAT THE COMPLAINANT'S FRANCHISE FROM ITS INCEPTION WAS SUBJECT TO IMPAIRMENT AND DAMAGE BY THE OPERATION OF A SECOND RAILROAD WHICH WOULD PREVENT ACCESS TO THE COMPLAINANT'S CARS IS UNTENABLE.

The defendants argue that the loss of patronage suffered by the complainant because access to its cars is made impossible or dangerous by the operation of the municipal cars is *damnum absque injuria.*

This argument of the defendants rests upon three grounds: first—that the right of the city to operate in such manner as to inflict damage against the complainant was reserved by the city at the time the complainant acquired its franchise; second—that the use of a street by a street railway is a proper and legitimate use of the street and one included within the original dedication thereof and involves the imposition of no *new servitude* in the street, and third—that

the damage caused by the municipal line is referable to the police power, and is remediless.

These three propositions may be briefly discussed.

A. The city has no reserved right to operate its cars in such manner as to cut off or impair access to the complainant's cars.

The defendants in the trial court argued and the court held that the complainant was not entitled to damages caused by the cutting off or impairment of access to its cars (239 Fed. 997, R. 192). This argument and holding is based upon the claim that if the franchise of the complainant is not exclusive, the city has the right to operate its line and any damage that results from the operation thereof is *damnum absque injuria*. In this connection the defendants also argued that the provision in Section 499 of the Civil Code limiting to five blocks the use and occupation of the same street by two street railroads necessarily implied a right in the second railroad to inflict upon the first whatever damage would result from the *fact* or *manner* of operating *for five blocks*. Enlarging upon this premise the defendants argued that any injury to complainant's franchise that would result from the manner of operation along twenty-one blocks on Market Street would be the same in kind as that which would result from a like manner of operation for five blocks, and differ therefrom only in *degree*. From this argument the defendants deduced the conclusion that unless the complainant's franchise is exclusive the complainant is without remedy for any damage suffered by it

through the *manner* in which the municipal cars are operated. This argument, however, is fallacious to the last degree. It is true, of course, that the complainant took its franchise subject to whatever rights and privileges were reserved to the city, either expressly or by implication. If the complainant did not acquire a *pro tanto* exclusive franchise, the city may now have the right to operate cars on the same street as the complainant, but, if it has that right, it does not follow that it may operate its cars *in any manner that it chooses.* There is a great distinction between a *legitimate* manner of operation which lessens the emoluments of a pre-existing franchise and *illegitimate* manner of operation which directly and physically *interferes* with the exercise and enjoyment of such franchise. It may be conceded that certain people will ride on the municipal cars from choice. If the city has the right to operate its cars the loss by the complainant of the patronage of persons who choose municipal cars will be due to competition and the complainant will be without remedy for such loss. But if other persons desire to board the complainant's cars and because of physical conditions created by the city are *unable* to do so, or because of the danger are *deterred* from doing so, the loss of the patronage of such persons will not be due to *competition* but to an unlawful physical interference with the exercise of the complainant's franchise. Such loss is a damage for which compensation must be paid to the complainant under the provisions of the Constitution of California.

The five block provision in Section 499 of the Civil Code merely reserved the right to allow two railroads

to operate upon the same street *for five blocks*. It did not reserve the right to allow a second railroad to operate *in such manner* as would physically interfere with the exercise and enjoyment of the first franchise. It did not reserve the right to permit a second railroad to operate in such manner as to prevent ingress and egress to and from the cars of the first railroad. Such a reservation would have been repugnant to the franchise granted to the *first* railroad. The whole argument of the defendants rests upon the false premise that given the right to *operate* there necessarily follows the right to operate in such manner as will physically interfere with the enjoyment of the complainant's franchise. The defendants and the trial judge overlooked entirely the distinction between *a right to operate* and *such manner of operation* as interferes with the exercise and enjoyment of another's franchise rights. This distinction, as we have already shown, was clearly pointed out in the opinion of Judge Brewer in *Omaha Horse Ry. Co. v. Cable Tramway Co.*, supra.

Again, even were we to assume that the complainant's franchise *when granted* was subject to a reserved right of the city to operate its own cars in such manner as to damage complainant's franchise by preventing or impairing the free exercise and enjoyment of it, it by no means follows that such reserved right still exists. After the complainant acquired its franchise, the Constitution of California was amended so as to prohibit the "damaging" of private property for public use *without compensation*. As previously pointed out, this provision of the constitution annexed a new attribute to private

property and conferred a new right upon the owner of property. After January 1, 1880, the city could no longer operate street cars *in such manner* as to interfere with the free exercise of the complainant's franchise without *paying in advance* for the damage so caused. It is immaterial in this connection that the franchise of the complainant was acquired prior to the enactment of the constitutional provision.

See

Swift v. Newport News (1906), 105 Va. 108; 52 S. E. 821, and cases cited.

It should also be kept in mind that the Market Street franchise of the complainant was regranted and confirmed on May 29, 1882, when the constitutional prohibition against "damaging" private property without compensation was in force (R. 25).

B. If right of access to property is cut off or materially impaired, it is immaterial that the public work which causes it is such as does not involve the imposition of a new servitude upon the street.

In numerous cases, owners of property abutting upon a public street have sought compensation on account of the *mere construction* of a street railway upon the street. In a few jurisdictions compensation has been awarded in such cases *if the abutting owner owned the fee* in the street. In such jurisdictions the construction of a street railway on a street is regarded as the imposition of a new servitude upon the street. In most jurisdictions compensation has been denied to an abutting owner for the *mere construction* of a street railway

upon the street without regard to whether the abutting owner owned the fee or not. In the latter jurisdictions relief is denied upon the ground that the use of a street for a street railway is one authorized by the original dedication of the street and does not involve the imposition of a new servitude upon the street. In the cases so holding, however, it was not claimed that the construction of the street railway deprived the owner of property or access to his property or materially interfered therewith. Whenever access to property abutting on a street has been cut off or materially impaired by the construction of a street railway damages have been allowed to the owner. For such annoyances and inconveniences as the abutting owner *suffers in common with the general public*, he may not recover compensation *unless the improvement upon the street is a new burden.* But even though the public improvement is not a new burden upon the street, if its construction inflicts upon an abutting owner a *damage in excess of that suffered in common with the general public*, a right of damage accrues to such owner.

See:

Mason City R. Co. v. Wolf (1906, C. C. A. 8th), 148 Fed. 961.

This case holds that the damages payable to the owner of property "damaged" for public use is measured by the injury to the property *in excess of that suffered in common with the general public.*

This is also the test recognized and applied in California.

See:

Eachus v. Los Angeles Ry. Co. (1894), 103 Cal. 614; 37 Pac. 750;

Smith v. Southern Pacific Co. (1905), 146 Cal. 164; 79 Pac. 868;

Williams v. Los Angeles Ry. Co. (1907), 150 Cal. 592; 89 Pac. 330;

Fairchild v. Oakland Ry. (1917, Cal. Sup. Ct.), 169 Pac. 388.

In the case last cited the appellant sought to reverse a judgment for damages for obstructing access to property abutting upon a street through the construction of a street railway upon the ground that no new servitude had been imposed upon the street. The Supreme Court of California held this fact to be immaterial, *if the plaintiff had suffered damage in excess of that suffered in common with the public.*

Invariably, therefore, damages have been awarded where access to property has been cut off or materially impaired. In all of the cases cited supra in which damages were awarded to abutting owners for a destruction or impairment of a right of access to his property, the rule was recognized that the construction of a street railway upon a street was not the imposition of a new servitude.

See particularly:

Slaughter v. Meridian Light Co. (1909), 95 Miss. 251; 48 So. 1040;

Williams v. Meridian Light Co. (1915), 110 Miss. 174; 69 So. 596;

Jaynes v. Omaha Ry. Co. (1898), 53 Neb. 631; 74 N. W. 67;

Stehr v. Mason City Ry. Co. (1906), 77 Neb. 641; 110 N. W. 701;

Foster Lumber Co. v. Arkansas Ry. Co. (1908), 20 Okla. 583; 95 Pac. 224.

See also:

2 Elliott Roads and Streets (3rd Ed.), Sec. 928, p. 381;

Nellis on Street Railways, Sec. 80, p. 180;

Booth on Street Railways (2nd. Ed.), Sec. 77, p. 141.

The latter author, after stating that the owner of property abutting on a street owns in the street an easement for access to his property, says that in this relation the owner "may prevent any act which would destroy or materially impair his right of access, but he is not entitled to protection against mere consequential damages which he suffers in common with others."

See also:

Booth on Street Railways (2nd Ed.), Sec. 80, p. 146;

12 Am. & Eng. Ency. of Law (2nd Ed.), 1174.

C. The city cannot, under the police power, justify its manner of competition so as to destroy the complainant's right to compensation for the damage so inflicted upon its franchise.

The defendants in the trial court argued and the trial judge held that the complainant's franchise was subject at all times to the exercise of the police power,* and that,

* 239 Fed. 996; R. 191.

whenever in the interest of public convenience it became necessary or desirable to construct additional street railways the owner of an existing railway had no recourse for the injury to its franchise. We have already considered, somewhat at length, the argument based upon police power. It has never been held that private property may be taken or damaged, without compensation, under the police power if the property so taken or damaged is "innocuous in itself".

In *Freund on Police Power,* Sec. 512, p. 547, the author says:

> "The exercise of the police power can hardly result in appropriation of property by the public, unless it be by way of confiscation as a penalty or for the purpose of destruction; for if the property is dangerous, it is dangerous in the hands of the public as well as of the private owner."

The distinction between the police power and eminent domain is thus stated by the same author (p. 546):

> "Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.'" (quoting from Davidson v. New Orleans, 96 U. S. 97.)

In *Pacific Telephone Co. v. Eshleman* (1913), 166 Cal. 640; 137 Pac. 1119, the court speaking of "certain fun-

damental principles" which distinguish the exercise of a police power from that of eminent domain, says:

> "The first of these is that this power goes merely to the *regulation* of the public utility, and that when an order passes beyond proper regulation, it amounts to a taking of the property, and the order is then referable, not to the police power, but to the power of eminent domain. The second of these is that this regulatory power falls into three natural subdivisions: 1. The right to regulate tolls and charges, to the end that fair compensation may be returned and excessive charges be forbidden; 2. The right to prevent discrimination upon the part of the public utility directed against those who employ it, or make use of its agencies, or the commodity which it furnishes; 3. The right to make orders and to formulate rules governing the conduct of the public utility, to the end that its efficiency may be built up and maintained and the public and its employees be accorded desirable safeguards and conveniences. Beyond these matters regulation, as regulation, does not and from the very meaning of the word cannot go." (166 Cal. 663.)

See also:

Belleville v. Turnpike Co. (1908), 234 Ill. 428; 84 N. E. 1049.

The turnpike company was the owner of a franchise to maintain a turnpike and exact tolls. The franchise was for twenty-five years with the provision that it should extend until such time, within that period or beyond it, as the city should pay to the company the original cost of construction of the turnpike. Some years after the franchise was granted a statute of Illinois was enacted providing that:

> "No toll gate shall be erected or kept, or toll demanded, within the corporate limits of any incorporated city or within 160 rods of such limits."

The locus of the turnpike at the time it was constructed was outside of the corporate limits of Belleville. Subsequently, however, the city annexed sufficient territory to bring the turnpike within the corporate limits, whereupon the city assumed and exercised control of the turnpike and commenced the present action to restrain the turnpike company from charging any tolls or exercising its rights and privileges under its franchise. From a judgment in favor of the city the turnpike company appealed. The Supreme Court of Illinois, in reversing the judgment of the Circuit Court, held that the city was "taking" the property of the company by interfering with the exercise of its franchise and that this could not be justified under the Illinois statute above quoted except upon payment of compensation. The court also held that the destruction of the franchise could not be justified under the police power. The portion of the opinion dealing with this matter is too lengthy for quotation. The substance of the holding is that the power exercised was not the police power, at all, since there was no *regulation* of the turnpike but an actual *taking* thereof.

The court held that while, without compensation to the owner, property may be injured through the enforcement of a reasonable *regulation*, it cannot be taken or its use impaired by any law extending beyond mere *regulation* unless compensation is paid.

Any injury to the property of a public utility corporation consequent upon a police *regulation* is a loss which it must suffer for the common good. The injury which the defendants seek to impose

upon the property of the complainant is not due to any *regulation* of the complainant's property. It is an injury and damage inflicted by the city in the interest of its own utility.

See,

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal. S. D.), 241 Fed. 912.

The complainant in the case cited was a gas and electric company furnishing light and power in the City of Los Angeles. It was operating under the self-executing provisions of the Constitution of California, discussed by this court in *Russell v. Sebastian* (1914), 233 U. S. 195; 58 L. ed. 912. The City of Los Angeles was also engaged in operating a public utility for the distribution and sale of electric energy in the City of Los Angeles. The city, in the interest of its own utility, passed an ordinance requiring the plaintiff to remove its poles, crossbars, wires and other appliances upon notice whenever it was desirable that the municipal utility should occupy with its poles, wires and appliances the places in the city's streets already occupied by the appliances of the plaintiff. After the enactment of the ordinance the plaintiff was notified by the city to remove certain of its wires to new locations and to entirely remove certain other fixtures. Thereupon the plaintiff sued to enjoin the city officials from enforcing the order and to have the ordinance declared void. The point involved in the case is thus stated in the opinion of Judge Bledsoe (p. 915):

> "• • • the city of Los Angeles having decided, because of reasons which were, no doubt, suffi-

ciently cogent and persuasive, that it would engage in the business of furnishing electrical energy to itself and to its inhabitants, in order that it may proceed in accordance with its own determined plans in the premises, has decreed by ordinance that privately owned companies engaged in the same business, and now and for some time lawfully occupying the public streets, may be required to remove or relocate, at their own expense, and subject to a penalty of fine and imprisonment for refusal, such instrumentalities situate upon the public ways of the city as seem to interfere with the proposed installation of its system. Or, to phrase it still differently, in order that its own municipal lighting system heretofore determined upon may be installed, the city has enacted that, in so far as the same may be necessary, other systems, already installed and belonging to private corporations, must be removed or relocated at the expense of the owners thereof."

The right of the city to enact and enforce the ordinance was, as in the present case, predicated upon "public necessity" and the "police power". The court, after holding that the police power was an attribute of sovereignty and its exercise governmental in character, says (p. 918):

> "While operating in its private capacity, and considerations of necessity giving rise to an exertion of the police power being nonexistent, as adverted to hereinabove, the power of police is wanting, and may not be asserted in furtherance of that which is merely expedient. In other words, when acting clearly within the domain of its private and proprietary capacity, the city may not draw sustenance or power to itself through an assumption of public and governmental functions."

The court in support of its conclusion quotes from *South Carolina v. U. S.* (1905), 199 U. S. 437; 50 L. ed. 261.

Further in the opinion, the court while holding that the plaintiff had no vested right in a particular place in the street which was not subject to *regulation* under the police power says (p. 919):

> "* * * however, pursuant to the terms of its lawful franchise, it has established its poles and wires and other instrumentalities in the public streets. It may lawfully and properly object to being compelled to remove or relocate them in order that another company, a competitor of later origin and right coming in, may take their place and thereby be enabled to carry on its own intended business. In other words, in this as in many other relations, first in time is first in right, and superiority of right consequent upon being first in time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right" (citing many cases).

In concluding the court said (p. 921):

> "As indicated hereinabove, assuming the necessity, propriety, and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

A decree was accordingly entered declaring the ordinance void and enjoining its enforcement.

See, also:

Owensboro v. Telephone Co. (1913), 230 U. S. 58; 57 L. ed. 1389.

If private property is damaged by a public improvement, the damage must be paid. No public convenience or necessity, however urgent, will justify the damaging of private property without compensation.

"If the public desire to erect works for public use, then the public, the party benefited, must bear the burden" and not impose it upon the property owner.

Gillespie v. South Omaha (1907), 79 Neb. 441; 112 N. W. 582.

> "The police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc. And upon like principle, a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain."

Chicago v. O'Brien (1884), 111 Ill. 532, 536, cited and approved in *Sanitary District v. Chicago R. Co.* (1915), 267 Ill. 252; 108 N. E. 312.

In the case last cited there is an interesting discussion of the difference between police power and eminent domain and the rights of the owner of private property consequent upon an exercise of either power.

See, also:

Illinois Co. v. Moriarity (1916), 135 Tenn. 446; 186 S. W. 1053.

And see

Hollingsworth v. Tensas (1883, C. C. W. D. La), 17 Fed. 109,

distinguishing between eminent domain and police power and holding that under the police power private property cannot be "taken" or "damaged" without compensation.

VIII.

THE ARGUMENTS OF THE DEFENDANTS IN SUPPORT OF THEIR CONTENTION THAT THE COMPLAINANT'S FRANCHISE IS NOT EXCLUSIVE FOR ALL IN EXCESS OF FIVE BLOCKS ARE UNTENABLE AND FIND NO SUPPORT IN THE AUTHORITIES UPON WHICH THE DEFENDANTS RELY.

The defendants contend that the complainant's franchise is not exclusive for all over five blocks covered by it and therefore that the operation of the municipal railroad will not violate any right of the complainant in so far as such right is predicated upon an exclusive franchise.

In the trial court the defendants argued that:

(1) The prohibition in Section 499 of the Civil Code against the "occupation and use" of the same street by "two railroad corporations" was a mere limitation upon the granting power of the Board of Supervisors, and, as such, was

capable of being removed at any time and, in fact, was removed by amendment of the section prior to the commencement of the municipal construction;

(2) The prohibitory provisions of Section 499 of the Civil Code were of a *police* character, in the interest of the public and not of a franchise-holder, and therefore did not enter into the obligation of complainant's franchise so as to be incapable of amendment or repeal;

(3) If the prohibitory provisions of Section 499 of the Civil Code did enter into the obligation of the complainant's franchise so as to confer upon the complainant a substantive right, that right was capable of amendment or repeal under the reserved power "to alter, amend or repeal" the complainant's charter; and

(4) The term "railroad corporations" in Section 499 of the Civil Code did not include a *municipal* corporation owning and operating a street railroad. We will now briefly deal with each of these four propositions.

A. Section 499 of the Civil Code was not a mere limitation upon the powers of the Supervisors in respect of granting street railway franchises. It was intended to secure to a franchise holder an exclusive right for all exceeding five blocks upon any street covered by the franchise.

The defendants contended in the lower court that Section 499 of the Civil Code was intended as a mere limitation or restriction upon the authority of the Board of Supervisors to grant street railway fran-

chises, which authority was conferred in Section 497 of the Civil Code. They further argued that Section 499 conferred no *right* upon a franchise holder. As a mere limitation upon the granting power, the defendants argued that the prohibition of the section might be removed at any time and was, in fact, removed by the amendment to Section 499 in 1911.*

This contention of the defendants was sustained by the trial court (239 Fed. 995, R. 190). It will be recalled that Section 497 of the Civil Code granted to the Board of Supervisors of an incorporated town power to authorize the construction of railroad tracks through the streets and public highways of the city. Section 498 of the Civil Code provided that every franchise granted by the Board of Supervisors, "in addition to the restrictions which they are authorized to impose", must contain certain other provisions specifically enumerated in the section. Section 499 then provided that:

> "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

The meaning of the section and the intention of the Legislature will be better understood when we consider the state of the law at the time the section was adopted, as well as the history of preceding legislation. The earlier statutes upon the subject, as previously noted, will be found in an appendix hereto.

* See amendment of 1911 to Sec. 499 in appendix hereto.

It will be seen that the first statute in California dealing with street railroads was approved on March 28, 1870. The second portion of the first section of that act was the prototype of Section 499 of the Civil Code and reads as follows:

> "Whenever any other railroad or company shall be granted the use of the same street or any part thereof they shall pay for the use of the rails already laid an equal share of the cost of constructing and maintaining the railroad on the street or part of the street thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such grant shall be made* for more than five blocks in all."

This statute was amended on April 4, 1870.

The only change effected by this amendment was to limit the joint *track* grant to *two* blocks instead of *five* blocks. The last clause of the statute after the amendment of 1870 read as follows:

> "But no such joint grant shall be made for more than *two* blocks in all."

On March 23, 1872, Section 1 of the foregoing act was again amended. After the second amendment the latter portion of the act read as follows:

> "*But no such joint grant* shall be made in the City and County of San Francisco for more than *two* blocks in all."

It will be noted that the last amendment confined the operation of the prohibition to the City and County of San Francisco, but otherwise made no change in the law.

It will thus be seen that all of the statutes antedating Section 499 of the Civil Code dealt with the

right of one street railroad company to use the *tracks* of another street railroad company. All of the amendments to the original statute had to do with limitations upon the *joint use* of the "*track*". While the Legislature that enacted Section 499 of the Civil Code was in session there was pending in the Supreme Court of California the case of *Oakland Railroad Co. v. Oakland-Brooklyn Railroad Co.* (45 Cal. 365). This case had been pending since September, 1871, and in it the defendant made the contention, subsequently upheld by the Supreme Court, that the statute of 1870, while limiting the right to use the *track* of the first franchise holder "was not intended to be a limitation upon the power • • • to grant an *independent* right" (45 Cal. 378). It was thereby established that there was nothing in the existing laws to prevent two street railroads from occupying the same *street* for an indefinite length provided the second did not use the tracks of the first. It was with this in mind that the Legislature, in enacting Section 499 of the Civil Code, prohibited the use of the same "street" by two railroad companies "for more than five blocks". Section 499 of the Civil Code, therefore, was intended to prevent not only the use by a second railroad of the *track* of another railroad for more than five blocks; it was intended to prevent the existence of a second railroad upon the same *street* for more than five blocks.

People v. Rich (1879), 54 Cal. 74.

The Legislature, in enacting Section 499, made two changes in the existing law, viz: (a) it prohibited the existence of two street railroads upon the same "street"

for more than five blocks without regard to whether the second occupied the tracks of the first or not; and (b) it changed the prohibition of the existing law from "two blocks" to "five blocks". These two changes effected by the statute are closely related. The Legislature, intending to prohibit the use of the same "street" by more than two railroads, evidently believed that a limitation upon the *joint* use of a street to *two* blocks would be too narrow and therefore extended the right to *five* blocks.

Having thus considered the history of the statute and the changes effected in the law by the enactment of Section 499, it remains to be considered what rights were guaranteed to a grantee of a street railroad franchise by the provisions of the section. The section, it will be noted, makes provision for the use of the same street by two railroads in two different ways: (a) on the same track, and (b) on independent tracks. It also provides that the joint use of the street, howsoever exercised shall not exceed five blocks. It is evident, therefore, that the section contained both a reservation of power and a grant of immunity—a reservation in the state, the grantor of the franchise, to permit the street to be used by a second railroad for five blocks,—an immunity in the first franchise holder against the existence of a second railroad on the same street for more than five blocks. The section reserved the power to permit a second railroad to occupy and use the tracks of another railroad. Coupled with the reservation of power to so burden the franchise of the first railroad was a corresponding immunity in the

first railroad to be free from the burden of a second on the same track for all exceeding five blocks. The section also reserved the power to permit a second railroad, on the same street on *independent* tracks. This reservation also was coupled with a corresponding immunity in the first railroad for all exceeding five blocks. The two clauses of Section 499 are correlative. The first *reserved a power* in the state (the grantor of the franchise), and the second *conferred a right* upon the grantee of the franchise. The section means precisely what it would mean if it had provided:

> "It shall not be lawful for two railroad corporations to occupy and use the same street or track for a distance of more than five blocks."

The meaning of the section necessarily was that the *occupation* and *use* of the same street by two railroad corporations for more than five blocks should not be made lawful.

In *Chenango Bridge Co. v. Binghamton Bridge Co.* (1866), 3 Wall. 51; 18 L. ed. 137, the charter of a bridge company contained a provision

> "that it shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of the Delaware River, within two miles, either above or below the bridges, to be erected and maintained in pursuance of this Act" (18 L. ed. 144).

Subsequently an act of the legislature chartered a bridge company to erect a bridge within the prohibited distance. The second act was held to be unconstitutional as impairing the obligation of the first franchise.

The court, speaking of the provision of the first charter that "it shall not be lawful for any person or persons to erect a bridge within the distance of two miles", said (18 L. ed. 145):

> "As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the Legislature. The restraint was on the Legislature itself. The plain reading of the provision, that 'It shall not be lawful for any person or persons to erect a bridge within a distance of two miles', is, that the Legislature will not make it lawful by licensing any person, or association of persons, to do it."

To the same effect see:

Farrington v. Tennessee (1897), 95 U. S. 679; 24 L. ed. 558.

We submit that the provisions of Section 499 of the Civil Code were not a mere limitation upon the power of the supervisors to grant franchises. We submit that the section conferred a *right* upon the franchise holder, the exclusiveness of which was limited only by the five block provision of the section. As previously noted, the section reserved to the grantor the power not only to permit two railroads to use the same *street* for five blocks, but also to permit a second railroad *to use the tracks* of the first *for five blocks*. Surely it would not be claimed that the section could be so amended as to permit a second railroad to occupy the *tracks* of a first railroad for an indefinite length. How then can it be claimed that the provision against the joint use of the *street* for five blocks can be amended so as to permit the joint use of the *street* for an indefinite length?

B. The provision of Section 499 of the Civil Code prohibiting the occupation and use of the same street by two railroad corporations for more than five blocks was not a mere police regulation enacted solely in the interest of the public and incapable of entering into the obligation of the complainant's franchise.

The defendants argued in the lower court that the prohibition against the occupation and use of the same street or track by two railroad corporations contained in Section 499 of the Civil Code was of a *police* character, capable of being repealed or amended at any time when public convenience required it or made it desirable, and, therefore, that it did not become part of the obligation of the complainant's franchise. This argument, however, proves too much. If tenable at all, it means that no *exclusive* franchise on city streets can ever be granted to a street railroad corporation. The argument means, if it means anything, that the rights of a street railway company in the city streets are mere *licenses* capable of being revoked at the city's pleasure, and not *contracts* vesting property rights incapable of amendment or repeal. The argument of the defendants in the lower court was that a prohibition against the use of the same street by a second corporation might be repealed at any time, under the police power, if public convenience in the matter of increased transportation facilities so required. This argument, as already stated, if it means anything, means that no *exclusive* franchise for street railways can ever be granted.

With the objects, purposes and limitations of the police power we shall hereafter deal. At the moment we confine ourselves to the discussion of the proposition

advanced by the defendants, that a provision of a street railway franchise vesting a *pro tanto* exclusive interest in the city's streets for street railway purposes may be altered, amended or repealed at any time under the police power of the State. In many cases similar arguments have been advanced and invariably they have been repudiated. The cases already cited to the effect that a street railway franchise is an irrevocable contract are here in point. In most of them, it may be observed, it was argued that the property of the franchise-holder could be curtailed or entirely destroyed in the exercise of the police power. In addition to the cases already cited, see:

City Railway Co. v. Citizens' Street R. Co. (1897), 166 U. S. 557; 41 L. ed. 1114,

upholding an exclusive street railway franchise.

See, again:

Grand Trunk Western Ry. Co. v. City of South Bend (1913), 227 U. S. 544; 57 L. ed. 633.

In the case just cited the Supreme Court of Indiana held that an ordinance granting a franchise to lay a double track on Division Street in the City of South Bend might be repealed at any time under the exercise of the police power of the city. The argument made and justified by the Supreme Court of Indiana was similar to the one advanced by the defendants here, namely, that a franchise of a street railway company to use the city's streets is not a contract incapable of amendment or repeal, but is more in the nature of a revocable license subject at all times not merely to regulation, but to abrogation under

the police power. Upon writ of error to the Supreme Court of Indiana this court held that a franchise of a street railway company was an irrevocable *contract* and not a mere *license*. It further held that while the city, in the exercise of its police power, might lawfully *regulate*, within reasonable limits the exercise of the franchise, *it could not abrogate the franchise*. After citing various examples of exercise of police power strictly so-called, this court said (p. 639):

> "*These, however, are examples of the persistence of the power to regulate, and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use, but destructive of the franchise.*"

Further in the opinion it is said (p. 639):

> "The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650; 29 L. ed. 516; 6 Supt. Ct. Rep. 252.
>
> "The state, with its plenary control over the streets, had this governmental power to make the grant. *There was nothing contrary to public policy in any of its terms, and being valid and innocuous, the police power* could not be invoked to abrogate it as a whole or to impair it in part."

Again (p. 640):

> "The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted

by the state. *If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure.*

"The power to regulate implies the existence, and not the destruction, of the thing, to be controlled."

As we have already shown, in many cases it has been argued that a franchise purporting to grant an exclusive right was, nevertheless, subject to the police power so as to permit of a second grant of the same nature. Such arguments have been universally repudiated by this court.

In *New Orleans Gas Light Co. v. Louisiana Light and Heat Producing & Mfg. Co.* (1885), 115 U. S. 650; 29 L. ed. 516, the court was considering an *exclusive* franchise granted to the appellant for supplying the city of New Orleans with gas by means of pipes, mains and conduits laid in the streets of the city. After the *exclusive* franchise had been granted the Constitution of Louisiana forbade such exclusive franchises, and thereupon another franchise was granted to the appellee. The second franchise, however, was held to impair the obligation of the first and to be, for that reason, invalid.

See, also:

New Orleans Water-Works Co. v. St. Tammany Water-Works Co. (1882 C. C. E. D. La.), 14 Fed. 194.

In this case the complainant had a water-works franchise which purported to be exclusive. Later a second franchise was granted to the defendant. The

argument was made that the second franchise was lawfully granted under the police power, and that the first franchise, although professing to be exclusive was in reality not exclusive but subject at all times to the exercise of the police power, and, therefore, to the granting of a second franchise.

Here, again, we have the contention that a contract incapable of impairment may not be made with respect to the water supply of a city. Replying to this argument Judge Pardee said (p. 199):

> "I desire to remark that there seems to me to be a great misapprehension as to the force and effect and proper exercise of the police power of a state. Its power and far-reaching effect may perhaps not be measured by general rules and definitions, and each case as it arises may have to be determined on its own particular facts and circumstances.
>
> "It seems, however, to be clear to me that regulations pertaining to the public health, manners, and morals come within its jurisdiction, and that, therefore, whenever any business, occupation, rights, franchises, or privileges become obnoxious to the public health, manners, or morals, they may be regulated even to suppression, individual rights being compelled to give way for the benefit of the whole body politic.
>
> "It seems equally clear to me that when, in the exercise of the police power, private property, or private or vested rights, must be taken for public use in order to carry out, or allowed to be carried out, improvements and regulations, or to carry on business or occupations, or schemes of public works, looking to the amelioration and benefit of the public health, manners, or morals, such private property or private rights of property must be entitled to the protection given by the constitution of the United States declaring, 'nor shall private property be taken for public use without just compensa-

tion' (see U. S. Const. Fifth Amend.), and by articles 155 and 156 of the constitution of Louisiana, declaring:

"Art. 155. 'No ex post facto law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made.'

"Art. 156. 'Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid.'

"All property of corporations or individuals is owned subject to the proper exercise of the police power. If my lot of ground is needed for a public hospital or jail, no doubt I am entitled to compensation before it can be taken from me. If my vested rights are needed to supply the city of New Orleans with pure water, must I not likewise be compensated?"

This case was affirmed in *St. Tammany Water Works Company v. New Orleans Water Works Company* (1887), 120 U. S. 64; 30 L. ed. 563.

In *New Orleans Water Works Co. v. Rivers* (1885), 115 U. S. 674; 29 L. ed. 525, an exclusive water-works franchise was upheld against a contention that a subsequent franchise was a mere exercise of the police power, the court saying (p. 528):

"It is idle to insist that this contract was prejudicial either to the public health or to the public safety."

In *City of Walla Walla v. Walla Walla Water Co.* (1898), 172 U. S. 1; 43 L. ed. 341 (affirming 60 Fed. 957), the same principle was applied. In the opinion it is said (43 L. ed. 347):

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

"If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. * * *

"*But where a contract for a supply of water is innocuous in itself,* and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

See also:

Belleville v. Turnpike Co. (1908), 234 Ill. 428; 84 N. E. 1049.

The latest case upon the subject is

Interurban Ry. & Terminal Co. v. Public Utilities Commission (1918 Ohio), 120 N. E. 831.

In this case a suburban railway company sought an increase in rates at the hands of the Public Utilities Commission of Ohio. The City of Cincinnati, one of the

parties mentioned in the complaint, demurred to the complaint, claiming that the rate of fare to be charged by the complainant was fixed in its franchise. It contended that this franchise was a contract immune from impairment. On the other hand, the railway company contended that the Public Utilities Commission had power to fix its rates "notwithstanding, and in disregard, of the contract", and, further, "that this may be done in the exercise of the police power of the state". These contentions were repudiated by the Supreme Court of Ohio, whose holding is correctly summarized in the syllabus as follows:

> "*A contract concerning proprietary rights, and harmless in itself,* made by a municipality in the exercise of power clearly conferred, is protected by the Constitution, and the police power cannot be invoked to abrogate or impair it."

As indicated in the syllabus, the holding of the court was predicated upon the ground that a street railway franchise was "innocuous in itself" and therefore entitled to be protected against impairment through an alleged exercise of police power.

The foregoing cases clearly show that if the subject-matter of a franchise is "innocuous in itself" the police power cannot be invoked to abrogate or impair it. The construction and operation of gas works, power plants, lighting plants, water works and street railways are within the class of public works "innocuous *in se*". They are not like matters affecting public health or morals, such as fertilizing plants, garbage incinerators, breweries or distilleries, and may, therefore, unlike the class just mentioned, be made the subject-matter of

contract as distinct from *license*. Being the proper subject-matter of contract, whatever rights are vested by the contract are necessarily protected by the constitutional guaranty of immunity from impairment.

It was proper for the Legislature of California to grant (through the instrumentality of the Board of Supervisors of San Francisco) to the complainant an exclusive or *pro tanto* exclusive franchise covering the streets of San Francisco. That contract, when granted, vested in the complainant *contract rights* to abrogate or impair which the aid of the police power cannot be invoked.

C. The right of the complainant to exclude a second street railroad from the streets occupied by it under its franchise, was a right of which the complainant could not be deprived under the reserved power of the State to alter, repeal, or amend corporate charters.

The third ground upon which the defendants in the trial court argued that the provision of Section 499 of the Civil Code did not enter into the obligation of the complainant's franchise was that the power to alter, amend or repeal corporate charters reserved in the California Constitution of 1849, permitted the amendment or repeal of all laws in respect of street railroads. The California Constitution of 1849 in Section 31 of Article IV provided as follows:

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

A casual reading of this section would seem to make it clear that the only laws over which a power of amendment or repeal was thus reserved, were laws having to do with the *formation* of corporations; in other words, laws conferring the *right to be a corporation.* There is nothing in the section which includes the right to amend or repeal *contracts* of corporations or deprive corporations of *contract* or *property* rights, and such has been the holding of the authorities.

See:

Railroad Tax Cases (1882 C. C. Cal., per Field J.), 13 Fed. 722, 754-757;

County of Santa Clara v. Southern Pacific Co. (1883 C. C. Cal., per Field J.), 18 Fed. 385;

Southern Pacific v. Ortin (1879 C. C. Cal.), 32 Fed. 457, 474;

Market Street Ry. Co. v. Hellman (1895), 109 Cal. 571, 580-581; 42 Pac. 225;

Detroit v. Detroit Road Co. (1880), 43 Mich. 140, 147; 5 N. W. 275.

The foregoing cases hold that the reservation of power to alte. or amend the laws under which corporations are *formed* does not include power to amend or repeal laws which grant *contract rights* to such corporations. Contract rights acquired by a corporation are as sacred as any other kind of property, and as much within the protection of the Federal Constitution.

In *St. Louis Iron Mountain Co. v. Paul* (1899), 173 U. S. 404; 43 L. ed. 746, the court, speaking through Chief Justice Fuller, said:

"The power to amend 'cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made'." (quoting from the opinion of Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700; 25 L. ed. 496; 43 L. ed. 748).

In *Owensboro v. Cumberland Tel. Co.* (1913), 230 U. S. 58; 57 L. ed. 1389, the appellee was the possessor of a franchise authorizing it to maintain its poles and wires upon the streets of the appellant. After the appellee had been enjoying the franchise for almost twenty years, the city council passed an ordinance requiring it to remove its poles and wires "within a reasonable time after the passage of the ordinance", in default of which the mayor was directed to have them removed. Thereupon the appellee filed a bill to enjoin the threatened enforcement of the ordinance. Replying to the contention that the attempted repeal of the franchise (which was perpetual in duration) was justified under the reserved power to alter, amend, or repeal, the Supreme Court, speaking through Mr. Justice Lurton, said:

"This general power to repeal ordinances obviously refers to ordinances which are legislative in character and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. • • •

"To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the mercy of changeable city councils • • • • • •

> "This clause of the charter in the instant case reserves no more than the power to repeal, as well as to make and amend, ordinances, but by no means operates to convey the power to 'repeal' a grant of street rights which had been accepted, and had thereby become a contract under the protection of the contract clause of the Constitution. That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for if it has application to this ordinance, it would equally apply to every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made" (57 L. ed. 1396).

In *Chicago, Milwaukee & St. Paul R. R. Co. v. Wisconsin* (1915), 238 U. S. 491; 59 L. ed. 1423, the syllabus reads as follows:

> "The reserved right of a state to amend corporate charters cannot be exercised so as to take the property of a corporation without due process of law."

See, also:

Iowa Telephone Co. v. City of Keokuk (1915 S. D. Ia. E. D.), 226 Fed. 82, to the effect that the power to alter, amend or repeal corporate charters applies only to the *right to be a corporation*, and does not apply to a franchise acquired by a corporation after its formation.

D. The City of San Francisco is bound by the provisions of Section 499 as they existed in 1879, in like manner and to the same extent as a private corporation operating a street railroad.

The last point urged by the defendants against the claim of the complainant to a *pro tanto* exclusive fran-

chise arising from the provisions of Section 499 of the Civil Code, is that the terms "railroad corporations" used in the section do not include a *municipal* corporation which owns and operates a street railroad. It may be said that this is the point most strongly urged by the defendants.

(1) The evil at which the prohibition of Section 499 of the Civil Code was directed was not dependent upon who owned the railroad. A municipally owned railroad is as much within the purpose of the statute as one owned by a private corporation.

The defendants contend that a municipal corporation is not a "railroad corporation" even when operating a railroad and, therefore, is not affected by the provisions of the statute. The question thus presented is one of statutory construction. If any effect be given to the *spirit* of the statute or to its purpose, it is obvious, of course, that the use of a city street by a second street railroad cannot affect the use of the street or the operation and enjoyment of the first franchise any the less because the owner of the second railroad is a municipal corporation. The loss through competition will be as great; the danger to passengers and the inconvenience of operation will be as great. In fact every evil sought to be prevented by the section will be present no less when the second railroad is owned by a *municipal* corporation than when it is owned by a *private* corporation or by a *natural* person.* The use of the same street by a municipal corporation is, therefore, clearly within

* A street railroad operated by a *natural* person is subject to the limitations of Section 499 of the Civil Code and to all of the other provisions of the title of the Civil Code in which that section appears. This is so because Section 511 of the Civil Code provides that:

"When a street railroad is constructed, owned, or operated by any *natural* person, this title is applicable to such person in like manner as it is applicable to corporations."

the spirit of the statute and should be held to be within its letter.

In *In re Board of Rapid Transit Commissioners* (1908), 128 App. Div. 103; 112 N. Y. Supp. 619, it is said (p. 624):

> "A thing within the intention of a statute is within the statute, even though an exact literal construction would exclude it." Citing *Riggs v. Palmer,* 115 N. Y. 506, 509; 22 N. E. 188.

In *Eastern Extension Co. v. United States* (1913), 231 U. S. 326; 58 L. ed. 250, a claim was made against the United States for the annual subsidy provided for in Spanish concessions for the construction and operation of submarine cables in the Philippine Islands. With reference to this claim this court said:

> "Whether the liability asserted is said to result from an express provision of assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty, it is equally within the policy and spirit of the statute; *and the letter of the statute should not be otherwise construed"* (58 L. ed. 255).

In *Pickett v. United States* (1910), 216 U. S. 546; 54 L. ed. 566, it is said (p. 569):

> "The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by a strict adherence to its verbiage."

How much greater the reason for applying the foregoing rule when the letter of a statute is sufficiently comprehensive to include a subject within the spirit of the statute, for it has been frequently held that the term

"corporation" is comprehensive enough to include municipal corporations, and, as we shall hereafter show, the term "railroad corporation" to include a municipality operating a street railroad.

In *Newark v. Funk* (1864), 15 Ohio St. 462, it was held that a statute providing that "any claim or choses in action due or to become due" to a judgment debtor, and all "money, goods or effects" which he might have in the hands of "any *person, body politic or corporate*" might be made subject to the payment of a judgment, was broad enough to include a municipal corporation.

To the same effect, see:

Bray v. Wallingford (1850), 20 Conn. 416;
Adams v. Tyler (1876), 121 Mass. 380;
Wilson v. Lewis (1872), 10 R. I. 285.

So, also, under a statute imposing liability "when death is caused by the wrongful act or omission of any person or *corporation*, the personal representative of the decedent may maintain an action therefor", it has been held that the term "corporation" includes a municipal corporation.

Keever v. Mankato (1910), 113 Minn. 55; 129 N. W. 158.

In *South Pasadena v. Pasadena Land Co.* (1908), 152 Cal. 579; 93 Pac. 490, a question arose as to whether the City of Pasadena which had purchased the property, business and franchise of a water company, a portion of whose water was appropriated to the use of the City of South Pasadena, could continue to serve the inhabitants of South Pasadena. The point was raised that

the City of Pasadena would have no right to enter the City of South Pasadena to lay pipes therein, etc., for the reason that Section 19 of Article XI of the State Constitution providing that in any city where there are no municipal water works for the supply of its inhabitants—"any individual or *any corporation duly incorporated for such purpose*" may lay mains in the streets for supplying such water, would not include a municipal corporation. In answering this contention the Supreme Court of California said:

> "This grant clearly does not, in terms, extend to a municipal corporation. It is contended that it, in effect, forbids the exercise of such privilege by another city. The provision is intended to further the interests of the public and facilitate the supply of water to the inhabitants of the city, and it should be liberally construed to effect that purpose. When the state gives such power to a city that, as an incident to supplying water to its own people, it may furnish water to the inhabitants of another city to whose use a part of the water is dedicated, the *city having such incidental powers should be considered as a 'corporation duly incorporated for such purpose'* " (152 Cal. 594).

In *In re Board of Rapid Transit Commissioners* (1908), 128 App. Div. 103; 112 N. Y. Supp. 619, the court was concerned with the liability of the municipal corporation of the City of New York for damages to abutting owners arising out of the construction of a subway. A statute enacted in 1891 provided for the construction of subways by "*railroad corporations*" then existing or thereafter incorporated.

In 1894 this act was amended so as to permit the City of New York itself to execute the work. It was claimed

that the City of New York was not a "railroad corporation" within the meaning of the original act, and was, therefore, not subject to the liabilities imposed upon "railroad corporations" by the original act, including a liability for damages to abutting owners.

It will thus be seen that the question involved is precisely similar to the one with which we are dealing, to wit, whether a municipal corporation operating a street railroad is a "railroad corporation" within the meaning of a statute relating to "railroad corporations". In disposing of this contention the court said:

> "The city, as a public corporation, or distinct political entity, was endowed by the Legislature with the same powers and privileges which it had sought to confer upon a railroad corporation, and it thus became charged with the same duties and obligations which would have been assumed by a railroad corporation in accepting the franchise. *For all the purposes of the construction of this underground railroad it became a railroad corporation,* having no more rights in the highways and public places of the city than would belong to any other corporation, and with no other or higher right to take private property than would belong to an ordinary railroad corporation" (112 N. Y. S. 624).

This case was affirmed in 197 N. Y. 81; 90 N. E. 456.

(2) A city when operating a street railroad or other public utility is not performing any governmental function.

It should be borne in mind that the city when operating a street railroad is not performing any *governmental* function.

Municipal corporations

> "exercise powers which are governmental and powers which are of a private or business charac-

ter. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the state. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred".

Vilas v. Manila (1911), 220 U. S. 345; 55 L. ed. 491, 495.

"When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire. *It is performing a function, not governmental,* but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal but the method is not."

28 Cyc. 125.

In *South Pasadena v. Pasadena Land Co.,* supra, the court, speaking of a municipal corporation engaged in furnishing water service, says:

"In the carrying on of the water service to the people of South Pasadena the city of Pasadena will not be acting in its political, public or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi-public capacity." (152 Cal. 592.)

To the same effect see:

Chafor v. Long Beach (1917), 174 Cal. 478; 163 Pac. 670.

See, also:

South Carolina v. U. S. (1905), 199 U. S. 436, 463; 50 L. ed. 261-270.

In the case just cited this court quotes with approval from New York and Pennsylvania cases to the effect that a municipal corporation when exercising *proprietary* powers is a "private" corporation.

To the same effect, see:

Wichita Water Co. v. Wichita (1916, Kan. 2nd Div.), 234 Fed. 415;

Los Angeles Gas Co. v. Los Angeles (1917, S. D. Cal. S. D.) 241 Fed. 912.

In the case last cited the City of Los Angeles, which was operating a gas and electric plant, sought by ordinance to compel the removal from the city streets of certain poles and other appliances of the complainant, a gas and electric company, in order that the poles of the municipal system might be placed in their stead. The court held, however, that the city was exercising *proprietary* powers and *could compete with privately owned plants upon the same condition only that a private competitor might compete.* We shall have occasion later to refer to this case at greater length.

To the same effect see:

Vallejo Ferry Co. v. City of Vallejo (1905), 146 Cal. 392; 80 Pac. 514.

See, also:

City of Seattle v. Stirrat (1909), 55 Wash. 560; 104 Pac. 834.

In *In re Board of Rapid Transit Commissioners* (1909), 197 N. Y. 81; 90 N. E. 456, (affirming the decision of the Appellate Division of the Supreme Court), the Court of Appeals of New York said:

> "Was the action of the city in building the subway governmental or proprietary in character? *The city* owns the subway, and it *is a railroad corporation* so far as the construction, operation, and leasing thereof is concerned. * * *
>
> "In other words, the subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. *It was built by and belongs to the city as a proprietor, not as a sovereign.*" (90 N. E. 460.)

Further in the opinion it is said:

> "The city in prosecuting the work, or causing it to be prosecuted through contractors, was not improving a highway, but building a railroad out of which it could make money, and *its liability is that of an ordinary railroad corporation doing the same work in the same way. It can lawfully claim no immunity from liability, except such as would belong to a railroad company, engaged in a similar enterprise, under like circumstances.* Although it was conducting a public work, it was such only and to the same extent as the building of a railroad by a private corporation is a public work. (90 N. E. 464.)

The latter decision was quoted and approved in

Ogden v. City of New York (1910), 126 N. Y. S. 189; and in

People v. Crane (1914), 150 N. Y. S. 933.

In *Omaha Water Co. v. City of Omaha* (1906, C. C. A. 8th) 147 Fed. 1, the court, speaking through Mr. Justice Sanborn, said (p. 5):

> "A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their officers because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. *In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary, powers. The purpose* of such a contract is not to govern its inhabitants, but *to obtain a private benefit for the city* and for its denizens."

McQuillan recognizes the same rule. In his work on *Municipal Corporations*, Vol. IV, Sec. 1801, page 3860, he says:

> "The general rule is that a municipality, in constructing or in operating its municipal plant, acts in a *business proprietary* or *individual capacity* rather than in a *legislative* or *governmental capacity*."

In *Eastern Illinois State Normal School v. City of Charleston* (1916), 271 Ill. 602; 111 N. E. 573, the city was operating a system of waterworks. In the opinion it is said:

> "In supplying water for the use of the inhabitants for domestic and commercial purposes, a municipality is not in the exercise of a governmental power, *but acts in the same capacity as a private corporation,* although the business is carried on for the public advantage, and, being public in its nature, is impressed with a public use." (111 N. E. 575.)

In *Eaton v. City of Weiser* (1906), 12 Idaho 544; 86 Pac. 541, the city was operating an electric light system. Says the court:

> "In its proprietary or private character a municipal corporation may engage in enterprises for its own immediate profit or advantage as a corporation, although inuring ultimately, of course, to the benefit of the public. Of this character are water works, to supply water to consumers; or gas works, to supply gas, on payment of rates or tolls, and other similar enterprises." (86 Pac. 543.)

See, also:

Chicago v. Selz (1902), 104 Ill. App. 376, 381;

Mayor v. Bailey (1845), 2 Den. 433;

Athens v. Miller (1914), 190 Ala. 82; 66 So. 702, 705;

Asher v. Independence (1914), 177 Mo. App. 1; 163 S. W. 574, 576;

Appeal of Brum (1888 Pa.) 12 Atl. 855, 856.

The respondents argued in the trial court that any distinction that may be recognized in the cases between

the *proprietary* and the *governmental* powers of a municipal corporation is recognized for the sole purpose of rendering a municipal corporation liable for torts committed by it in the operation of a public utility. That the principle has no such limited application a review of the authorities makes clear. A typical case in this behalf is

Western Savings Fund Society v. Philadelphia (1858), 31 Pa. St. 175,

wherein the syllabus reads as follows:

> "A city, in supplying gas to its inhabitants, acts as a private corporation, and is subject to the same duties, liabilities, and disabilities. *It cannot impair the obligation of a contract entered into by it, in that capacity, because it may deem it for the benefit of its citizens to do so.*"

In the opinion it is said (p. 183):

> "The supply of gas-light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant, does not destroy the clear and well settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument,

though the public may derive a common benefit therefrom, *the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.*"

(3) A general law of the state dealing with "corporations" operating public utilities is binding upon a municipal corporation which operates such a utility.

Calloway v. Cossart (1885), 45 Ark. 81, was a suit in which each of the parties sought to quiet his title as against the other.

The defendant claimed title by adverse possession. This claim was challenged by the plaintiff upon the ground that during the time that it was claimed the statute of limitations was running the State of Arkansas was the equitable owner of the land in controversy because it had advanced its bonds to a bank which had formerly owned the property, looking to the assets of the bank for indemnity and security; that the bank had conveyed to trustees for the benefit of its creditors, and since the State was one of the creditors the State was the equitable owner of the property.

In holding this argument untenable, the court said (p. 88):

> "The attitude of the State with regard to this property, or her rights of indemnity in it, was just such as might have been assumed by any individual or private corporation, which might have chosen to lend its credit to the bank. *When a State steps down into the arena of common business in concert, or in competition with her citizens, she goes divested of her sovereignty.* The reason of the maxim, '*Nullum tempus occurrit regi*', no longer applies."

Rains v. The City of Oshkosh (1861), 14 Wis. 403, was an action for the unlawful detainer of certain leased land. The plaintiff alleged that the defendant, a municipal corporation, was in arrears for a year's rent. The action was brought to recover possession of the property. The lower court had held that the action could not be maintained against the defendant for the reason that "an action for an unlawful holding over of demised premises will not lie against a municipal corporation". Upon appeal this point was held to be without merit and the judgment in favor of the defendant was reversed, the court saying (p. 405):

> "Nor do we think the objection well taken, that the action will not lie against a municipal corporation. The language of the statute is general, and applies to any *person* who holds over demised premises after the termination of the lease, or contrary to the covenants thereof, or after rent becomes due; and we have no doubt that the word 'person' extends to municipal corporations. We can conceive of no possible reasons why the statute should not extend to corporations, public or private, for the remedy is quite as essential and necessary against them as against a natural person."

See, also:

Springfield v. Walker (1885), 42 Ohio St. 543, 547.

To the effect that a municipal corporation, in so far as its *proprietary* powers are concerned, is subject to the general laws of a state, see also:

Governor v. Woodworth (1872), 63 Ill. 254.

In this case it was held that the State of Illinois, represented by its governor, was subject to a statute

of limitations to the same extent as would be a private individual. In the opinion it is said (p. 257):

> " * * * when the Government becomes a partner with individuals in the prosecution of some business or enterprise, it divests itself of its sovereign character, so far as related to that business, and takes the character of a private citizen. It does not impart to its associates its privileges and prerogatives, but descends to a level with those with whom it associates itself, and the character which belongs to its associates, and to the business which is to be transacted. * * *
>
> As a member of a corporation a Government never exercises its sovereignty. In such cases it acts merely as a corporation, and exercises no other power in the management of the affairs of the corporation than are given by the act of incorporation. *Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat. 904."

The opinion also quotes from

> *Bank of United States v. M'Kenzie* (1829), 2 Brock. 393; 2 Fed. Cas. 718.

In the latter case the opinion was by Chief Justice Marshall. The question involved and the holding of the court are thus summarized in the syllabus:

> "A state, becoming a partner in business with corporations or individuals, divests itself of its sovereign character and descends to their level instead of imparting to them its own privileges and prerogatives."

To the same effect see:

> *Bank of United States v. Planters' Bank* (1824), 9 Wheat. 904; 6 L. ed. 244 (per Marshall, C. J.).

See also:

Brown v. Trustees (1902), 224 Ill. 184; 79 N. E. 579.

In the latter case it was held that while general statutes of a state and particularly the statute of limitations may not be invoked against a state when exercising a *governmental* power, it is otherwise with respect to the exercise by the state of a *proprietary* power. In the opinion it is said:

> "Statutes of limitation do not run against the state, in respect to public rights, unless the state is expressly included within the terms of the statute. The rule is founded on the maxim of the common law, 'nullum tempus occurrit regi.' It was supposed that the time and attention of the sovereign was occupied by the cares of government, and there could be no negligence or laches on his part. The same prerogative extends to the state, in its sovereign capacity, as to all *governmental* matters. As to them no delay in resorting to the remedy will bar the right, but, if the state becomes a partner with individuals, *or engages in business, it divests itself of its sovereign character and is subject to the statute.* Governor v. Woodworth, 63 Ill. 254. *In such relations it does not exercise sovereignty but acts merely as an individual and cannot claim the exemption.* The rule that statutes of limitation do not run against the state also extends to minor municipalities created by it as local governmental agencies, in respect to *governmental* affairs affecting the general public. The exemption extends to counties, cities, towns, and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, *but as to matters involving private rights they are subject to statutes of limitation to the same extent as individuals.*" (79 N. E. 580, citing many cases.)

On the question here involved the case of *Metropolitan R. R. Co. v. District of Columbia* (1889), 132 U. S. 1; 33 L. ed. 231, appears to us to be conclusive. The District of Columbia sued for work done and materials furnished by it in paving streets in the City of Washington in consequence of the failure of the defendant to do such work and furnish such material in accordance with its duty as prescribed by statute. The defendant interposed a plea of the statute of limitations. The court sustained a demurrer to the plea of the statute of limitations and ordered judgment for the plaintiff upon the theory that a municipal corporation was not subject to a general law prescribing limitations. The statute of limitations relied upon contained a preamble to the effect that,

> "nothing can be more effectual to the peace and tranquility of this province than the quieting the estates of the inhabitants thereof, and for the effecting of which no better measures can be taken than a limitation of time for the commencing of such actions as in the several and respective courts within this province are brought, from the time of the cause of such actions accruing."

The statute itself provided that:

> "All actions sued or brought by any *person* or persons within this province, * * * shall be commenced within three years."

It was contended by the District of Columbia that it was not a "person" within the meaning of this statute. In disposing of this contention this court said (p. 235):

> "Corporations are 'persons' in the law. There is no apparent reason why they should not be included in the statute. It is conceded that private

corporations are included. On what ground, then, can municipal corporations be excluded? Not on the ground that they are not 'persons' for that would exclude private corporations. They are, therefore, within the terms of the law. *Are they not also within the spirit and reason of the law? They are certainly within the reason of the preamble. It is just as much for the public interest and tranquility that municipal corporations should be limited in the time of bringing suits as that individuals or private corporations should be.* The reason stated in the preamble for the passage of the law applies to all; and, moreover, it shows that the objects of the law are beneficent ones, and, therefore, that it should be liberally construed." (33 L. ed. 235.)

See again:

Keever v. Mankato (1910), 113 Minn. 55; 129 N. W. 158;

In re Board of Rapid Transit Commissioners (1909), 197 N. Y. 81; 90 N. E. 456.

It appears, therefore, that whenever a municipal corporation is engaged in work of a *proprietary* character it is subject to all laws dealing with "corporations" engaged in works of like character.

(4) The cases relied upon by defendants in support of their contention that the term "railroad corporations" in Section 499 of the Civil Code do not include a municipal corporation operating a railroad are readily distinguishable.

The defendants contended in the lower court, and the trial judge held, that the term "railroad corporations" in Section 499 of the Civil Code did not include a municipal corporation operating a street railroad (239 Fed. 994, R. 189). Both court and counsel in support of this position relied upon certain cases of this

court, notably *Knoxville Water Co. v. Knoxville,* 200 U. S. 22; 50 L. ed. 353, and *Madera Water Works v. Madera* (1913), 228 U. S. 454; 57 L. ed. 915. These two cases may be said to be typical of the cases which have denied the right of immunity of a private corporation from competition by a municipal corporation.

(a) The Madera Water Works Case.

The Madera Water Works Company had a franchise under the self-executing provisions of the California Constitution* which gave to *all* gas and water companies the right to freely operate and *compete* within all of the municipalities of the State. The purpose of the constitutional provision was *to prevent exclusive grants* and thereby promote competition. The purpose of the Constitution was to obviate the necessity of a franchise; indeed the Constitution itself was a grant to all who availed themselves of its offer.

Russell v. Sebastian, supra.

Notwithstanding this fact, the water works company claimed that the constitutional provision giving *all* corporations the *right to compete* precluded the City of Madera from constructing its own works. Not only did the constitutional provision which constituted the franchise of the water works company contain no *express* provision excluding competition by the municipality, but, as already stated, it was designed to promote freedom of competition. Necessarily it was held that the water works company had no franchise exclusive as against the city. The difference between such a case and the case at bar is at once apparent. In the

* These provisions were reviewed by this court in Russell v. Sebastian (1914), 233 U. S. 195; 58 L. ed. 912.

Madera case the appellant claimed that a grant *containing no words of prohibition* and intended to promote competition was *in its nature* exclusive. In the present case the complainant relies upon a prohibition contained in a general statute of the State and directed against the "occupation and use" of a street by two railroad corporations. In the *Madera* case the constitutional provision relied upon by the appellant was a grant of power to *all* who availed themselves of it; it contained no limitation or prohibition of any kind. In our case the statute (Sec. 499, C. C.) contains an *express prohibition* against the "occupation and use" of a street by two railroad corporations.

(b) The Knoxville Water Works Case.

In *Knoxville Water Co. v. Knoxville,* supra, the City of Knoxville contracted with the water company for a supply of water and the erection of water works which, after being built, the city was to have the option of purchasing at the time to be agreed upon. The city *covenanted* in the contract "not to *grant* to any other person or corporation any contract or privilege to furnish water to the City of Knoxville", etc. This court adopted the rule of strict construction, and, quoting from *Joplin v. Southwest Missouri Light Co.* (1903), 191 U. S. 150; 48 L. ed. 127, said:

> "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied." (50 L. ed. 360.)

Further in the opinion it is said:

> "It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying

> the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers." (50 L. ed. 361.)

Accordingly the court held that while by its covenant the city was bound not to *grant a franchise* to another corporation, it was not precluded from erecting its own water works and competing with the water company.

Justices Brown, White, Peckham and Holmes dissented.

It should be noted that,

(a) the *Knoxville* case involved the construction of a *covenant* between a municipal corporation and a private corporation; and

(b) the city covenanted not to "*grant any contract or privilege*" to furnish water to the city.

It will be noted at the outset that the *Knoxville* case differs from the case at bar in that the *Knoxville* case involved the construction of a covenant of the city, whereas the present case involves the construction of a statute of the state. It is true that in the present case we are dealing with a covenant in the complainant's franchise. The covenant, however, is to the same effect as the statute which the franchise incorporates by reference. When we have determined the meaning of the statute we have fixed the construction of the

city's covenant because the covenant is co-extensive with the statute.

The rule of strict construction upon which the *Knoxville* case turned, as stated in the opinion of Mr. Justice Harland, requires that no public body "be held upon mere implication or presumption to have divested itself of its powers". A divestiture of power presupposes a self-created limitation, i. e., a voluntary covenant such as was involved in the *Knoxville* case. In that case the court was construing such a covenant made by the city with a water company and considering the claim of the water company that the city *by a self-imposed limitation* had deprived itself of the power to construct its own water-works. In the present case the city claims that a general law of the state in respect of "railroad corporations" does not apply to a municipal corporation operating a railroad, and, therefore, that a covenant of the city incorporating the statute is not binding upon the city. In the *Knoxville* case, the contract was with the city alone and the covenant which was the subject of construction was that of the city, and was *voluntarily* included in the contract. In the present case the contract of the complainant's predecessor was with the State of California; the prohibition against the "occupation and use" of a street by two railroad corporations, although expressly incorporated in the franchise by the city, *was not created by the city.* The prohibition was created by a general law of the State of California and would have been incorporated in the franchise by operation of law even if the city had not *expressly* incorporated it. It follows that the

prohibition in the franchise means precisely what it means in the statute. We have already shown that the prohibition in the statute includes *municipal* corporations operating railroads as well as *private* corporations so engaged. It follows, therefore, that the term "corporation" in the franchise included the city because the same term in the statute included the city.

In another view the *Knoxville* case is inapplicable. The question in the *Knoxville* case was the intent of the makers of a contract. One of the parties to the contract was a public agency, i. e., a municipal corporation. In determining the meaning of the contract, the court was guided by the rule that all intendments are in favor of the public, and that a public agency, i. e., a municipality, will not "be held upon mere implication or presumption to have divested itself of its powers". The question in the *Knoxville* case, as in all cases involving the construction of a contract, public or private, had to do with the intention of the parties. No other guide to the intention of the parties appearing, the court resorted to a rule of construction and resolved the question in the light of that rule. In the present case there are many facts shedding light upon the intention of the legislature in enacting Section 499 of the Civil Code and of the city of San Francisco in incorporating that section in the franchise of the complainant's predecessor. We may draw upon the legislation that preceded Section 499, the purpose of that section in the light of the existing law and the evils sought to be avoided thereby. Particularly are we to consider that a second railroad upon a street would be no less burdensome,

if owned and operated by a municipality than if owned and operated by a natural person or a private corporation. A municipally owned street railroad, as previously argued, would be within the spirit of Section 499 as well as within the letter of that section. For this reason the terms "railroad corporations" in Section 499 should be held to include a municipal corporation and similar provisions in the franchise should likewise be held to include the city of San Francisco.

See

Metropolitan R. R. Co. v. District of Columbia (1889), 132 U. S. 1; 33 L. ed. 231.

The interpretation which includes a municipal corporation within the prohibition of Section 499 and of the franchise which incorporated that section is "a fair and reasonable interpretation" and this being so, there is no necessity for resorting to the rule of strict construction employed in the *Knoxville* case, as the reason for resorting to that rule does not exist.

Russell v. Sebastian (1913), 233 U. S. 195; 58 L. ed. 912, 922.

In determining whether a municipality owned street railroad is subject to a general law concerning "railroad corporations" the solution of the question is not affected by the fact that the suit in which the question arises is one between a private corporation and a municipal corporation. The question would be precisely the same if the present suit were one in *quo warranto* by the people of the State at the instance of the Attorney-general to determine by what right the municipality was operating a street railroad on Market Street

in contravention of the franchise of the complainant. As against the State of California in such a proceeding would it be claimed or held that the municipal corporation was not subject to the general laws of the State concerning "railroad corporations"? We submit that it would not, particularly in view of the fact already shown that municipal corporations exercising *proprietary* powers are subject to general laws.

IX.

IT IS NOT TRUE, AS CONTENDED BY THE DEFENDANTS, THAT THE CIVIL CODE OF CALIFORNIA PERMITS ONE STREET RAILWAY TO CROSS THE TRACKS OF ANOTHER STREET RAILWAY WITHOUT MAKING COMPENSATION THEREFOR AND IT HAS NEVER BEEN SO HELD IN CALIFORNIA.

The defendants contended in the lower court that it is a general rule of law that one street railway may cross the tracks of another street railway without making compensation therefor, and that Sections 469 and 500 of the Civil Code of California relied upon by the complainant did not alter that rule. The defendants also contended that it has been so held in two California cases which we will later discuss.

We will first deal with the argument of the defendants based upon the Civil Code sections and will then review the two cases relied upon by the defendants.

A. The arguments of the defendants in respect of the construction of Sections 469 and 500 of the Civil Code are unsound.

In reply to the complainant's contention that Section 469 of the Civil Code of California required compensa-

tion to be paid by one street railway for crossing the tracks of another, the defendants made two arguments, each of which may be briefly answered. The first argument was that Section 469 referred only to the crossing of a street railway by a "*steam*" railroad.

No such limitation appears in the statute, however, and in addition Section 510 of the Civil Code provides that:

> "Street railroads are governed by the provisions of title three of this part, so far as they are applicable, *unless such railroads are therein specially excepted.*"

The title of the Civil Code referred to is the title in which Section 469, supra, appears. It follows, therefore, that *the provisions of Section 469 apply to the crossing of one street railroad by another, because Section 510 of the Civil Code expressly provides that they shall so apply.* This disposes of one of the arguments of the defendant.

The second argument of the defendants was that Section 500 of the Civil Code did not incorporate by reference the portion of Section 469 of the same code which required compensation for the crossing of the tracks of one railroad by those of another. It will be recalled that Section 500 of the Civil Code provides as follows:

> "Any proposed railroad track may be permitted to cross any track already constructed, *the crossing being made as provided in chapter two, title three, of this part.*"

In "chapter two, title three" referred to in Section 500 is Section 469 of the Civil Code which, among other things, provides that:

> "Whenever the track of one railroad intersects and crosses the track of another railroad, *whether the same be a street railroad,* • • • the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible."

Then follows the provision for payment of compensation (a) by agreement of the parties if they can agree or (b) by ascertainment in an eminent domain proceeding if they cannot agree. The defendants argued that Section 500 of the Civil Code above quoted only incorporated so much of Section 469 of the same code as had to do with the *manner* in which the second company should cut the rails of the first, i. e., in such manner "as to permit the passage of the cars on each road with as little obstruction as possible". The trial judge would seem to have so held (239 Fed. 997, R. 192).

No reason appears for so limiting the operation of Section 500, and if the legislature had so intended, it is hard to understand why it did not incorporate in Section 500 the clause of Section 469 dealing with the *manner* of cutting the rails instead of adopting that clause by a reference which is longer than the clause itself.

B. Neither of the cases relied upon by the defendants to support their claim that Section 469 of the Civil Code does not require a street railroad to make compensation to another street railroad when it crosses the latter's tracks so decides, nor was such a question involved in either of the cases.

In the trial court the defendants relied upon two California cases to justify their claim that the com-

plainant was not entitled to compensation for the appropriation of its easement which would result from the crossing of its tracks by the municipal tracks. The trial court cites both of these cases to like effect (239 Fed. 997, R. 192). The two cases are

Market St. Ry. Co. v. Central Ry. Co. (1877), 51 Cal. 583; and

Pacific Ry. Co. v. Wade (1891), 91 Cal. 449; 27 Pac. 768.

A brief consideration of each of these cases is in order.

1. Market St. Railway Co. v. Central Ry. Co.

In this case it appeared that the Market Street Railway Company was operating a street railroad on Market Street under a franchise granted by the legislature in 1857. On October 29, 1875, the Board of Supervisors of San Francisco granted to the Central Railway Company a franchise along Market Street from Turk to Powell Streets (a distance of one block) and thence along Turk and Powell. Under the authority of the franchise the Central Railway Company laid down two tracks on Market Street from Turk to Powell. One of these tracks was on the north side of the Market Street Company's track and five feet distant therefrom; the other was on the south side of the Market Street Company's track and five feet distant therefrom. When the Central Railway Company was about to join its Market Street tracks with its tracks already constructed on Powell Street and on Turk Street, the Market Street Company brought a suit to enjoin the threatened crossing and to prevent the Central Com-

pany from acting under its franchise at all. The theory of the complaint was that the second franchise was utterly void. This contention was based upon the fact that the plaintiff's franchise required it to lay its road in the center of the street and the defendant's franchise was in substantially the same terms. The Supreme Court of California affirmed a decree of the District Court denying an injunction to the plaintiff, and held that if the franchise of the defendant was void for the reasons claimed it was a matter of which the State only could complain and not the plaintiff. The court, in its opinion, does state that the defendant had the right to cross the tracks of the plaintiff, but such holding is merely incidental to the main question decided. Nowhere in the record or in the briefs did the plaintiff claim a right to compensation for the crossing of its track and the appropriation of its easement consequent thereto. Nowhere in the briefs or in the opinion is any reference made to the provisions of the Civil Code above discussed, requiring compensation to be made whenever one railroad crosses the tracks of another. As stated before, the theory of the complaint was that the franchise of the defendant was utterly void. The plaintiff did not admit the validity of the franchise and claim compensation for the easement appropriated in the lawful exercise of the franchise. It can hardly be said, therefore, that this case, because decided after the enactment of the codes, involved the construction of the code sections upon which complainant relies.

2. Pacific Railway Co. v. Wade.

Much less application has the case of *Pacific Railway Company v. Wade* above mentioned, as will be evident

when the facts of the case are stated. The Pacific Electric Railway Company was in the hands of a receiver. The Los Angeles Consolidated Electric Railway Company presented a petition to the Superior Court of Los Angeles County having jurisdiction of the receivership proceeding, setting forth that it had entered upon the construction of a line of road as authorized by a certain franchise, and that in the prosecution of its work it was necessary to intersect the tracks of the Pacific Railway Company *and run along the same for a distance of three blocks.* The petitioner asked for an order allowing it to operate upon the tracks of the Pacific Railway Company for said *three* blocks and directing the receiver to grant the necessary facilities therefor. It also asked that the order fix the amount of compensation which it should pay for the right to use the tracks. Immediately the Pacific Railway Company applied to the Supreme Court of California for a writ of prohibition to prohibit the Superior Court from taking jurisdiction of the petition. The Pacific Railway Company claimed that the right to use its tracks for three blocks would have to be condemned *in an independent eminent domain proceeding;* that it was so provided in Section 469 of the Civil Code, and that the Superior Court in the receivership proceeding was without jurisdiction to entertain the petition. The Supreme Court of California held that Section 469 of the Civil Code did not apply to a case *where the right sought was a right to use the tracks of another company for less than five blocks, but applied only where it was sought to cross the tracks of another company.* The Supreme Court also held that Section 499 of the Civil Code made

specific and *exclusive* provision for the use by one company of the tracks of another company *for five blocks or less,* and fixed the compensation for that use as "payment of an equal portion for the construction of the tracks and appurtenances used by said railways jointly." The difference between the Pacific Railway case and the case at bar is obvious. In the former the second company sought only to *use the tracks* of the first company for *three* blocks, a right which Section 499 of the Civil Code gave it upon payment of "an equal portion for the construction of the track." In the present case the defendants purpose to construct municipal tracks across the tracks of the complainant, and may lawfully do so only upon paying the complainant for the latter's easement thus appropriated, as provided in Section 469 of the Civil Code.

X.

CONCLUSION.

In consideration of the foregoing, we respectfully submit that the decree appealed from should be reversed. Without regard to whether the complainant's franchise is exclusive or not, we submit that the proposed municipal action will violate the constitutional guaranties of the complainant. We therefore submit that the operation of the municipal cars in the manner proposed should be enjoined until compensation to the extent of the "taking" or "damaging" of complainant's property consequent thereon is paid. The Con-

stitution of California requires *payment in advance* for the "taking" or "damaging" of private property for public use.

See:

Vilhac v. Stockton R. Co. (1878) 53 Cal. 208.

San Mateo W. W. v. Sharpstein (1875) 50 Cal. 284.

Steinhart v. Superior Court (1902) 137 Cal. 575; 70 Pac. 629.

Pacific Telephone Co. v. Eshleman (1913) 166 Cal. 640; 137 Pac. 1119.

Respectfully submitted,

GARRET W. MCENERNEY,
WILLIAM M. ABBOTT,
WILLIAM M. CANNON,
ANDREW F. BURKE,
Counsel for Appellant.

San Francisco, March, 1919.

Appendix.

HISTORY OF CALIFORNIA STATUTORY AND CONSTITUTIONAL PROVISIONS RELIED UPON BY THE DEFENDANTS TO JUSTIFY THE CONSTRUCTION AND OPERATION OF A MUNICIPAL LINE ON MORE THAN FIVE CONSECUTIVE BLOCKS OF A STREET ALREADY OCCUPIED BY THE COMPLAINANT.

The following are the California statutory and constitutional provisions relied upon by the defendants.

Statute March 28, 1870 (Stats. 1869-70, p. 481).

The first statute of California dealing with street railroads was approved March 28, 1870 (Stats. 1869-70, p. 481). This statute empowered the Board of Trustees or Supervisors of incorporated cities and towns to grant street railway franchises, and contained various restrictions upon the manner of construction and various regulatory provisions. The important section of the statute, as far as this discussion is concerned, is Section 1, reading as follows:

> "The Trustees, City Council or Supervisors of all incorporated cities or towns, or the Supervisors of any city or county within the limits of such cities or towns, and the Boards of Supervisors of the various counties outside of such cities or towns, shall have the right to grant to any person or corporation the right to lay down and maintain, for a term not exceeding twenty-five years, an iron railway track or tracks upon any streets or avenues or public highway in said cities or towns, or in said counties, outside of said cities or towns, and to run cars thereon, to be propelled by horses (or otherwise, as hereinafter provided), and to carry passengers or freight thereon; *provided,* that whenever any other railroad or company shall be granted the use of the same street, or any part thereof, they shall pay for the use of the rails

already laid an equal share of the cost of constructing and maintaining the railroad on the street, or part of the street, thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such grant shall be made for more than five blocks in all.*"

Statute April 4, 1870 amending Sec. 1 of Act of March 28, 1870 (Stats. 1869-70, p. 786).

On April 4, 1870, Section 1 of the foregoing Act was amended (Stats. 1869-70, p. 786). As amended it read as follows:

"The Trustees, City Council or Supervisors of all incorporated cities or towns, or the Supervisors of any city and county, within the limits of such cities or towns, and the Boards of Supervisors of the various counties, outside of such cities or towns, shall have the right to grant to any person or corporation the right to lay down and maintain, for a term not exceeding twenty-five years, an iron railroad track or tracks, upon any streets or avenues or public highways in said cities or towns, or in said counties, outside of such cities or towns, and to run cars thereon to be propelled by horses (or otherwise, as hereinafter provided), and to carry passengers or freight thereon; *provided,* that whenever any other railroad or company shall be granted the use of the same street, or any part thereof, they shall pay for the use of the rails already laid, an equal share of the cost of constructing and maintaining the railroad on the street or part of the street thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such joint grant shall be made for more than two blocks in all.*

Statute March 23, 1872 amending Sec. 1 of Statute of March 28, 1870 (Stats. 1871-2, p. 515).

On March 23, 1872, Section 1 of the foregoing Act was again amended (Stats. 1871-2, p. 515). As amended it read as follows:

"The Trustees, City Council, or Supervisors of all incorporated cities or towns, or the Supervisors of any city and county within the limits of such cities or towns, and the Board of Supervisors of the various counties outside of such cities or towns, shall have the right to grant to any person or corporation the right to lay down and maintain, for a term not exceeding twenty-five years, an iron railroad track or tracks upon any streets or avenues or public highways in said cities or towns, or in said counties outside of such cities or towns, and to run cars thereon, to be propelled by horses or otherwise as hereinafter provided, and to carry passengers or freight thereon; *provided,* that whenever any other railroad or company shall be granted the use of the same street, or any part thereof, they shall pay for the use of the rails already laid an equal share of the costs of constructing and maintaining the railroad on the street or part of the street thus occupied jointly, and thereupon shall be entitled to the joint use of such part of said railroad; *but no such joint grant shall be made in the City and County of San Francisco for more than two blocks in all.*

Civ. Code of Cal. in effect January 1, 1873.

On January 1, 1873, the California codes went into effect, and the foregoing statute of 1870, as amended, was superseded by Title IV of Part IV, Division I of the Civil Code. This Title, the subject of which is "Street Railroad Corporations" embraced Sections 497 to 511. The sections bearing upon the question here involved are Sections 497, 499, and 500, which, as originally enacted, read as follows:

Section 497. "Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years not exceeding fifty from the Trustees, Council, or other body to whom is intrusted the government of the city or town under such

restrictions and limitations and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses or mules, unless for special reasons, as hereinafter provided."

Section 499. "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; *but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.*"

[This is the section hereinbefore quoted as it existed when the franchise under which complainant claims was granted.]

Section 500. "Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in Chapter II, Title III, of this Part. In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days."

Statute March 3, 1876 amending Sec. 497 Civ. Code (Amendts. 1875-6, p. 76).

On March 3, 1876, Section 497 was amended (Amendts. 1875-6, p. 76). The amendment consisted in inserting after the word "mules" in the last sentence, the words "or by wire ropes running under the streets and moved by stationary engines". The amendment, of course, was for the purpose of providing for franchises of cable lines.

Statute February 25, 1891 amending Sec. 497 Civ. Code (Stats. & Amendts. 1891, p. 12).

On February 25, 1891, Section 497 of the Civil Code was again amended (Stats. & Amendts. 1891, p.

12). The amendment consisted in the insertion of provisions permitting electricity as motive power, and giving power to municipal authorities to impose such terms, restrictions and limitations on the use of the streets and the construction and mode of operating the roads as might be deemed necessary for the public safety or welfare.

Statute February 25, 1891 amending Sec. 499 Civ. Code (Stats. & Amendts. 1891, p. 13).

On February 25, 1891, Section 499 of the Civil Code was amended (Stats. & Amendts 1891, p. 13). The section after the amendment read as follows:

> "Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively."

Statute March 21, 1907 amending Sec. 499 Civ. Code (Stats. & Amendts. 1907, p. 837).

On March 21, 1907, Section 499 was again amended (Stats. & Amendts. 1907, p. 837), and, after the latter amendment, read as follows:

> (Two Lines of Street Railway May Use Same Track.) Two or more lines of street railway, operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such

lease or contract, upon payment of an equal portion for the construction of the tracks and appurtenances used by such railways jointly;

(Extent To Which May Be Used.) "but in no case shall a company owning or operating one line of street railway be permitted to condemn the right to occupy and use the same street or tracks for a distance of more than five blocks consecutively.

(Lines of Different Gauge.) "Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitations before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence.

Statute April 24, 1911 amending Sec. 499 Civ. Code (Stats. 1911, p. 1101).

In 1911 Section 499 was amended twice. The two amendments are practically identical in language. The latter approved April 24, 1911, reads as follows:

(Two or More Street Railway Corporations May Use the Same Tracks.) "The legislative body of any incorporated city, city and county, or town, may permit two or more lines of street railway to use the same portion of the same street or the same tracks upon such terms as may be agreed upon by the companies operating such railways; but no permission shall be granted to one company to use the same tracks or portions of the same street for a distance of more than five consecu-

tive blocks without the consent of the person or company occupying said portion of the street and then only upon payment of an equal portion of the cost of construction of the tracks and appurtenances used by such railways jointly; provided, that any incorporated city, city and county, or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits for any number of blocks upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation, of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitation before prescribed, over the same ground as may be occupied by such prior track or tracks; provided, the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

Pol. Code of Cal. Sec. 4408 in effect January 1, 1873.

In addition to the foregoing, Section 4408 of the Political Code of California at all times since that Code took effect on January 1, 1873, has provided that the common council (board of supervisors) of a municipality has power:

"4. To regulate the streets, wharves, piers, and chutes in the city, and the use thereof."

Charter of San Francisco adopted January 26, 1899, in effect January 8, 1900 (Stats. 1899, p. 241).

By concurrent resolution adopted January 26, 1899, the Charter of the City and County of San Francisco, theretofore ratified by the electors of said city and county, was approved by the Legislature of California. This Charter was in full force and effect on the first Monday after the first of January, 1900, to wit, January 8, 1900. Since the last-mentioned date this charter has been the organic law of the City and County of San Francisco.

In the Charter as originally adopted it was provided in Subdivision 27 of Section 1 of Chapter XXII thereof, that the Board of Supervisors should have power,

> "To regulate street railroads, tracks and cars; to compel the owners of two or more of such roads using the same street for any distance not exceeding ten blocks, to use the same tracks and to equitably divide the cost of construction and expense of maintenance thereof between the owners; to fix, establish and reduce the fares and charges for transporting passengers and goods thereon; to regulate rates of speed and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads."

Amendment approved February 5, 1903 to Sec. 1, sub. 27 of Chap XXII San Francisco charter (Stats. 1903, p. 586).

The foregoing subdivision was amended on December 4, 1902, and the amendment approved by the Legislature on February 5, 1903 (Stats. 1903, p. 586), and, as amended, now provides that the Board of Supervisors shall have power

> "To regulate street railroads, tracks and cars; to permit two or more lines of street railways,

operated under different managements, to use the same street, each paying an equal portion for the construction and repair of the tracks and appurtenances used by said railways jointly for such number of blocks consecutively, not exceeding ten blocks, to fix, establish and reduce the fares and charges for transporting passengers and goods thereon; to regulate rates of speed, and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads."

Charter of San Francisco, Art. XII (Stats. 1899, p. 346).

Art. XII of San Francisco Charter deals with the "Acquisition of Public Utilities". The preamble and the first two sections of the article as originally enacted are as follows:

"It is hereby declared to be the purpose and intention of the people of the city and county that its public utilities shall be gradually acquired and ultimately owned by the city and county. To this end it is hereby ordained:

SECTION 1. Within one year from the date upon which this charter shall go into effect, and at least every two years thereafter until the object expressed in this provision shall have been fully attained, the supervisors must procure through the city engineer plans and estimates of the actual cost of the original construction and completion by the city and county of water works, gas works, electric light works, steam, water or electric power works, telephone lines, street railroads and such other public utilities as the supervisors or the people by petition to the board may designate.

In securing estimates of the original cost of the construction and completion of water works by the city and county, the supervisors must procure and place on file plans and estimates of the cost of obtaining from all of the several available sources a sufficient and permanent supply of good pure

water, for the city and county, in order that propositions for the acquisition, construction and completion thereof, and the incurring of municipal indebtedness therefor, may be submitted to the electors of the city and county as hereinafter set forth.

SECTION 2. After such plans and estimates shall have been procured and filed, the supervisors shall, at as early a date as they may deem for the best interests of the city and county, enter into negotiations for the permanent acquisition by the city and county, by original construction, condemnation or purchase of such or any of said public utilities as they may regard most important to the city and county to be first acquired, and to formulate and submit to the electors of the city and county, at a special election, propositions for the permanent acquisition and ownership thereof.

Before submitting propositions to the electors for the acquisition by original construction or condemnation, of public utilities, the supervisors must solicit and consider offers for the sale to the city and county of existing utilities, in order that the electors shall have the benefit of acquiring the same at the lowest possible cost thereof."

Amendment to Sections 1 and 2 of Art. XII of Charter, approved February 5, 1903 (Stats. 1903. p. 591).

By amendment approved February 5, 1903, Secs. 1 and 2 of Art. XII of the San Francisco Charter were amended to read respectively as follows (Stats. 1903, p. 591):

"SECTION 1. Whenever the Board of Supervisors by ordinance, as hereinafter provided, shall determine that the public interest or necessity demands the acquisition, construction or completion of any public utility or utilities by the City and County, or whenever the electors shall petition the Board of Supervisors, as provided in Section 3 of this Article, for the acquisition of any public utility or utili-

ties, the Board of Supervisors must procure from the Board of Public Works, through the City Engineer, plans and estimates of the cost of original construction and completion, by the City and County of such public utility or utilities.

In securing estimates of the cost of original construction and completion of water works, by the City and County, the Board of Supervisors must procure, as hereinabove specified, and place on file plans and estimates of the cost of obtaining, from such sources as the Board of Supervisors may designate as available, a sufficient supply of good, pure water for the City and County."

"SECTION 2. Before submitting the propositions to the electors for the acquisition by original construction or condemnation of public utilities the Board of Supervisors must solicit and consider offers for the sale to the City and County of existing utilities, in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

Amendment to Section 19 of Art. XI of Constitution of California, adopted October 10, 1911.

On October 10, 1911, Sec. 19 of Art. XI of the Constitution of California was amended and since said date has provided as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works including their franchises or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to

regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality expressed by ordinance."

With the adoption of the foregoing amendment the *first* constitutional provision was made in this State for the establishment and operation of public works for "*transportation*". For this reason it is unnecessary to consider the terms of the original section or of an amendment thereto, approved in 1885.

The foregoing constitute all constitutional, statutory and Charter provisions upon which the defendants rely to justify the construction and operation of the proposed municipal line.

-14-

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 282.

UNITED RAILROADS OF SAN FRANCISCO, APPELLANT (COMPLAINANT BELOW),

vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL., APPELLEES (DEFENDANTS BELOW).

OUTLINE OF ARGUMENT FOR APPELLANT.

GARRET W. McENERNEY,
Counsel for Appellant.

INDEX.

	Page
1. Constitutional guarantees involved by appellant	1
2. Nature of controversy	2
3. Questions involved	3
4. Purpose of injunction sought by complainant	4
5. Difference between Federal and State Constitutions in respect of prohibition against "taking" property	4
6. In California the remedy of injunction inheres in and is a part of the constitutional protection against "taking" or "damaging"	5.
7. Claims which would be open to complainant in eminent domain proceedings and which are here open to it	6
8. Complainant's *priority* of right gives it a *superiority* of right, entitling it to operation on *outer* tracks	7
9. The controversy here is to be regarded simply as one "between two private street railroad litigants"	8
10. Nature of complainant's property	10
(*a*) Complainant owns an easement in the street	10
(*b*) Complainant's property rights are of the "same kind [as] and of equal dignity" with those of an abutting proprietor	10
(*c*) Complainant's property is such as may be *benefitted* by increased travel, and "destroyed" by decreased travel	10, 11
11. A right of safe access to its cars inheres in every street railway franchise	11
12. The public, which receives the benefit should bear the burden of a public improvement which damages private property	12, 13
13. In California the constitution insures compensation to an individual whose property is "damaged" by an improvement of a government character	13
14. The physical longitudinal interference with access to appellant's cars causes an injury peculiar to appellant and constitutes a "damage" under the California constitution.	13, 14
15. Contentions of appellee in reply to our claim for injunction to prevent the "damaging" of appellant's property	14
16. The franchise contemplated that section 499 in its then form should be a part of appellant's franchise	16

Page

17. It is unreasonable to presume that the appellant *agreed by implication* that its franchise might be impaired or destroyed 16
18. The ordinances complained of are not referable to the police power 17
19. The contention that appellant's franchise was subject to "amendment, alteration, or repeal"..... 17
20. The appellee's argument that the appellant has no "private" property in the street which is capable of being damaged. 17
21. It is immaterial in California whether or not a street railway is regarded as a "new servitude"..... 17
22. The physical longitudinal interference which access, in California, constitutes a "taking" of property..... 18
23. Divergence of views of appellant and appellees in respect of the rights of enjoyment which inhered in appellant's franchise 18, 19
24. The right of the city to operate street cars on Market street, is in no sense referable to a "reservation" in appellant's franchise 19
25. The city has no right to operate cars on any street if such operation will impair or destroy the vested rights of prior railway proprietors..... 19
26. The appellant has an exclusive franchise on Market street for all in excess of five blocks..... 19
27. The provisions of section 499, in its then form, entered into and became a part of appellant's franchise..... 20
28. The purpose of the five-block limitation in section 499 was to protect the first franchise holder. It limits not the number of *tracks*, but the number of proprietors upon the same street 21
29. The Knoxville case, relied upon by the appellees, furnishes no analogy in the present case because—
    (*a*) The Knoxville case involved the construction of a contract, dependent upon particular clauses and peculiar surrounding circumstances, whereas here we are concerned with a statute of the State.... 22
    (*b*) The Knoxville case involved the interpretation of a contract framed by both parties, and the language of which was attributable to both, whereas the instant case involves an enactment of the legislature, in the preparation of which the appellant had no part, and the language of which is in no wise attributable to appellant.... 23

Page

30. Under the constitution of California one street railway may not use the tracks of another street railway except upon payment of compensation in advance..... 24

TABLE OF CASES AND OTHER REFERENCES.

Airline Ry. vs. R. R. Commission (1907, C. C., D. Ala.), 155 Fed., 792, 802–803..... 17
Appeal of the North Beach & Mission R. R. Co. (1867), 32 Cal., 499 10
Board of Rapid Transit Commissioners, *In re* (1908), 128 App. Div., 103; 112 N. Y. Supp., 619, 624..... 9
Board of Rapid Transit Commissioners, *In re* (1909), 197 N. Y., 81, 90 N. E., 456, 460, 464..... 9
Boca R. R. Co. vs. Sierra Valley R. R. (1905), 2 Cal. App., 546; 84 Pac., 298..... 24
Boston Corporation vs. Salem R. R. (1854), 2 Gray, 1, 29..... 22
Cal. Civil Code, Section 498..... 21
Cal. Civil Code, Section 499..... 3, 16
Cal. Civil Code, Section 502..... 21
Cal. Const. of 1879, Art. I, Sec. 14..... 2
Chafor vs. Long Beach (1917), 174 Cal., 478; 163 Pac., 670..... 9
Chicago Co. vs. Chicago (1897), 166 U. S., 226, 236..... 4
Crocker vs. New York (1883), C. Ct. S. D., N. Y., 15 Fed., 405.. 11, 14
Dana vs. Rock Creek Co. (1896), 7 App. D. C., 482, 492–3..... 13
Detroit vs. Detroit Ry. Co. (1902), 184 U. S., 368–372, 384–5... 16
Eachus vs. Los Angeles Ry. Co. (1894), 103 Cal., 614; 37 Pac., 750 ..... 12, 17
Edison Co. vs. Merchants Co. (1901), 200 Pa., 209; 49 Atl., 766. 7
Fairchild vs. Oakland Ry. Co. (1917), Cal. Sup. Ct.), 169 Pac., 388 18
Gainesville R. Co. vs. Hall (1890), 78 Tex., 169; 14 S. W., 259.. 14
Gillespie vs. South Omaha (1907), 79 Neb., 441; 112 N. W., 582. 12
Grand Trunk Ry. Co. vs. South Bend (1913), 227 U. S., 544.... 16
Knoxville Water Co. vs. Knoxville (1906), 189 U. S., 434..... 23
Lake Erie R. Co. vs. Scott (1890), 132 Ill., 429; 24 N. E., 78... 12
Langdon vs. New York (1883), 93 N. Y., 129..... 11, 13
Los Angeles Co. vs. Hubbard (1911), 17 Cal. App., 646; 121 Pac., 306 11
Los Angeles Gas Co. vs. Los Angeles (1917, S. D. Cal), 241 Fed., 912 17

Page

Los Angeles Ry. Co. vs. Los Angeles (1907), 152 Cal., 242; 92 Pac., 490 21
Mason Co. vs. Wolf (1906, 8th C.), 148 Fed., 961, 962 12
Morgan vs. Louisiana (1876), 93 U. S., 217 11
Murray vs. Charleston (1877), 96 U. S., 432 17
McCracken vs. Hayward (1844), 2 How., 608 22
Norwood vs. Baker (1898), 172 U. S., 269, 277 4
Northwestern Tel. Exch. vs. Twin City Tel. Co. (1903), 89 Minn., 495; 95 N. W., 640 7
Omaha Horse Ry. Co. vs. Cable Tramway Co. (1887), 30 Fed., 324; (1887), 32 Fed., 727; (1888), 33 Fed., 689 ..... 11, 13, 14
Omaha Water Co. vs. Omaha (1906, 8th C.), 147 Fed., 1, 13–14. 17
Owensboro vs. Cumberland Telephone Co. (1912), 230 U. S., 58. 16
Pacific Ry. Co. vs. Wade (1891), 91 Cal., 449; 27 Pac., 768 20
Pacific Telephone Co. vs. Eshleman (1913), 166 Cal., 640, 665; 137 Pac., 1119, 1127 18
Paris Electric Co. vs. Southwestern Tel. Co. (1894, Tex. Civ. App.); 27 S. W., 902 8
People vs. Elk River Mill Co. (1895), 107 Cal., 221, 227 13
Petition of Philadelphia St. Ry. Co. (1902), 203 Pa., 354; 53 Alt., 191 13
Pumpelly vs. Green Bay Co. (1871), 13 Wall., 166, 182 17
Reardon vs. San Francisco (1885), 66 Cal., 492; 6 Pac., 317 12
Richards vs. Washington Terminal Co. (1914), 233 U. S., 546.. 13, 14
San Francisco Ry. vs. Scott (1904), 142 Cal., 222, 228 11
South Carolina vs. U. S. (1905), 199 U. S., 436, 463. 9
South Pasadena vs. Pasadena Land Co. (1908), 152 Cal., 579, 592; 93 Pac. 490 9
St. Helena vs. San Francisco Ry. Co. (1914), 24 Cal. App., 71; 140 Pac., 600 21
Taylor vs. Chicago (1887), 125 U. S., 98 14
Tri County Tel. Co. vs. Bridgeville Power Co. (1918, N. D.), 167 N. W., 503 8
United Railroads vs. Superior Court (1916), 172 Ca., 80, 82... 8
Vilas vs. Manila (1911), 220 U. S., 345 9
Wilcox vs. Engebretsen (1911), 160 Cal., 288 5
Williams vs. New York (1887), 105 N. Y., 419 22

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vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL., APPELLEES (DEFENDANTS BELOW).

OUTLINE OF ARGUMENT FOR APPELLANT.*

Appeal by Complainant from Decree for Defendants Entered After Final Hearing in the District Court at San Francisco, Circuit Judge Hunt Presiding.

Complainant's case depends upon the pertinency and the applicability thereto of provisions of the Federal and State Constitutions: (*a*) The impairment of contract clause, and (*b*) The due-process clause applied to prevent the "taking" of private property for public use without just compensation

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*Br. or Brief in this Outline refers to the Brief for Appellant.

in the Federal Constitution; and the provision of the Constitution of California as follows:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." (Art. I, sec. 14.)

The controversy arises out of the existence in San Francisco of two railway systems, (*a*) the one owned and operated by the complainant, and (*b*) the other which came into existence in 1912, owned and operated by the municipality.

At the filing of the bill in this case (June 12, 1916) the municipality threatened to parallel the tracks of the complainant the entire length of the busiest thoroughfare in San Francisco, upon which the complainant is operating under a fifty-year franchise, running out in 1929 or 1932, accordingly as the term of the franchise is computed, from the original grant in 1879 or from a supplementary and enlarging grant in 1882.

The tracks of the complainant are laid pursuant to law, as near to the middle of the street as possible, and the threatened municipal operation was to be upon outside tracks, paralleling the tracks of the complainant for twenty-one blocks, the entire length of Market street, which originates at the city front and ends westward at the foot of Twin Peaks.

The Market Street cars of the complainant carry daily 209,000 passengers, of whom 51,000 ride upon transfers.

It is here to be said that by contract and a consent decree made between the parties in other litigation, the municipality operates on outer tracks from the city front to Kearny street, a distance of *seven* blocks (R., 324-333), and that the only longitudinal interference which is here under attack is upon the remaining *fourteen* blocks. (The parties to this record *jointly* use the outer tracks above mentioned for *five*

of the *seven* blocks and the municipality alone uses the outer tracks on the remaining two blocks.)

The plans of the municipality which the bill of complaint sought to enjoin contemplated not merely a longitudinal interference with the access of the public to the complainant's cars, but also involved a transverse or crossing interference with the right of way.

The circumstances here stated only in outline give rise to the questions involved, which are these:

(*a*) Is there a "taking" or a "damaging" of property in consequence of the longitudinal interference or the transverse interference with the exercise or enjoyment of complainant's franchise?

(*b*) Are the plans of the municipality here sought to be enjoined (including the nullification of appellant's priority rights, *infra*, p. 7, par. 4) in such derogation of the substance of the grant contained in complainant's franchise that this fact, without more, gives rise to the application of the impairment of contract clause.

(*c*) Is it true, as claimed by complainant, that it has an exclusive franchise on Market street for the length thereof, in excess of five blocks, in view of section 499 of the Civil Code of California, effective January 1, 1873, in force at the grant of the franchises of 1879 and 1882, and which then read as follows:

> "Two *corporations* may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad *corporations* occupy and use the same street or track for a distance of more than five blocks."

(*d*) Is the complainant entitled to an injunction considering that the municipality has not solicited and considered offers for the sale to the city and county of the lines of the complainant and has, therefore, not complied with the provisions of section 2 of Article XII of the Charter, com-

pliance with which is a condition precedent to the acquisition of a public utility?

It is our purpose orally to deal with points (*a*), (*b*), and (*c*), and to rest point (*d*) upon the argument found in Brief for Appellant (pp. 90-97).

If the appellant is entitled to an injunction to prevent the consummation of the plans of the municipality here complained of *upon any one of the grounds urged by us*, the ultimate result will be the same, *i. e.*, a remission of the municipality to proceedings in eminent domain brought under State law in State courts and by them finally determined, unless there be a sacrifice of complainant's rights, guaranteed by the Federal Constitution, in which event the adjudication would come to this court for review by writ of error.*

The scope of the injunction would be as effective whether the acts complained of amounted to a "taking" or merely to a "damaging" of property. In our briefs we think we have fully shown that the property involved would be taken and not merely damaged; therefore, we have a case within the due-process clause. If we do not make a case within the due-process clause, we nevertheless have a case within the "damaging" clause of the State Constitution.

The State Constitution differs from the Federal Constitution in the matter of "taking" in several respects.

It has been said by this court that the due-process clause prohibits the taking of property without just compensation paid *or secured* to the owner (Chicago Co. *vs.* Chicago (1897), 166 U. S., 226, 236; Norwood *vs.* Baker (1898),

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* We assume without having investigated the question that the municipality could not condemn in the Federal Court upon cross-bill, but if it should turn out that it could do so, the argument which we make is in no way impaired. (See 234 Fed., 868.)

172 U. S., 269, 277), whereas under the California Constitution it is fully settled that the compensation must be paid first, and that it is not sufficient merely to *secure* the payment. Indeed, it has been held that Code provisions providing for the taking or damaging of property upon the giving of security merely are unconstitutional. (Brief, page 162, for California cases so holding.)

Again, the Constitution of California in terms provides that compensation "shall be ascertained by a jury" unless a jury be waived.

The remedy of injunction inheres in the constitutional *right*, as indispensable to its vindication and preservation.

Wilcox *vs.* Engebretsen (1911), 160 Cal., 288, involved the changing of a grade. The statute under which the work was done provided for preliminary assessment of benefits and damages to which the property owner had the right to object. The objections were passed on finally by the city council. The commissioners who were to assess the damages reported that the plaintiff's property would not be damaged and the city council confirmed the report. Defendants were then proceeding to do the work when the plaintiff, the owner of property abutting upon the street, sued to enjoin the work until compensation to the extent of the damage to be suffered by him should be paid. The defense of the defendants was that the manner of computing the damage, under the statute, *i. e.*, by commissioners and the city council was exclusive. The court, however, held that this was not so but was a mere method of allowing the parties to agree upon compensation. The court further held that if the property owner did not agree to accept the compensation awarded him by the commissioners and the city council, the damages would have to be assessed in a proper proceeding. The court said (160 Cal., 299):

> "He cannot be deprived of this constitutional guararty by the decision of a city council that he is

not damaged. His right to a trial by jury does not depend upon the provisions of the statute but upon the Constitution. The fact that the statute makes no provision for a condemnation suit, except where damages are awarded to the owner and he is unwilling to accept the amount allowed, does not deprive him of the right to a jury trial in cases where no damages have been awarded him in the proceedings. Under the Constitution, the ascertainment and payment of such damages in the mode there prescribed, is a condition precedent to the right of the city to do the public work which will cause the damage. It follows that the property owner has the right to enjoin such work until his damages have been lawfully ascertained and paid in the manner prescribed by the Constitution. (*Geurkink vs. Petaluma*, 112 Cal., 306 [44 Pac. 570]; *Bigelow vs. Ballerino*, 111 Cal., 559 [44 Pac. 307]; *Duncan vs. Ramish*, 142 Cal., 694 [60 Pac. 661]; *Eachus vs. Los Angeles*, 103 Cal., 620 [42 Am. St. Rep. 149, 37 Pac., 750]; 2 Lewis on Eminent Domain, secs. 618, 634, 638.) Consequently, if it should turn out that the change of grade was lawfully ordered, the plaintiff would still be entitled to enjoin the work until his damages, if any, in excess of benefits shall have been lawfully ascertained and paid."

In its last analysis this suit may be said to be one to maintain the *status quo*, leaving eminent domain open to the appellee.

If these events were to come to pass, *i. e.*, injunction here and later eminent domain by the municipality, several propositions would arise, the establishment of any one of which makes a case for injunction here asked.

In the event of eminent domain by the municipality against the appellant it would be open to the appellant (defendant in condemnation) among other things to claim:

1. Damages for longitudinal or transverse interference, or both, arising out of (*a*) a taking, (*b*) a damaging, and (*c*) an impairment of contract for acts in derogation of the grant.

2. Damages for competition losses, the right to which would depend upon the validity of the claim that the appellant has an exclusive franchise for the entire length of Market street, save five blocks.*

3. That under section 499, Civil Code, in the form in force from 1873 to 1891, a railway operation by a second corporation was required to be exercised on the tracks of the first corporation; and that the section did not contemplate or allow an operation on independent tracks:** this in support of our argument that section 499, in its then form is a part of our franchise contract (*infra*, p. 19 foot).

4. That inasmuch as the complainant had been compelled by its franchise (R., 22) and section 498, Civil Code of California, to construct its tracks "as nearly as possible in the middle" of the street, it had acquired that priority of right accruing to those first in point of time, and hence the decree of condemnation would be limited to a change of location of the complainant's tracks so that they would constitute the outer operation, leaving the inner tracks to the municipality.

> "As between two corporations exercising similar franchises upon the same street, priority carries superiority of right * * * if interference and limitation of one or the other are unavoidable, the later must give way."
>
> Edison Co. *vs.* Merchants Co. (1901), 200 Pa., 209; 49 Atl., 766.

To similar effect are

Northwestern Tel. Exch. *vs.* Twin City Tel. Co.

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*The appellant claims that the five-block privilege is more than exhausted by the seven-block operation, which arises out of the agreement and consent decree elsewhere mentioned (See Record, 324-333).

**We have printed a review of the authorities which bear upon the interpretation of section 499 so they may be in form convenient for the court. In our brief (pp. 117-119) we construe the section to contrary effect, but a closer study of the decisions just referred to has altered our view. Either view is sufficient for our purposes in the instant case.

(1903), 89 Minn., 495; 95 N. W., 640.
Tri County Tel. Co. *vs.* Bridgeville Power Co. (1918, N. D.), 167 N. W., 503.
Paris Electric Co. *vs.* Southwestern Tel. Co. (1894, Tex. Civ. App.); 27 S. W., 902.
Brief for appellant, pp. 33, 34.

If these contentions would have been available to us had the municipality sued the appellant in eminent domain, they are available to us to support our claim for an injunction to maintain the *status quo* until these questions shall be adjudged and an equitable and compensatory award made in condemnation.

We proceed to discuss the merits of our case, taking up, first, the damaging of property; second, but briefly, the taking of property; thirdly, the impairment of contract arising out of (*a*) acts in substantial derogation of the grant, and (*b*) by reason of an exclusive franchise for the length of Market street, save five blocks.

At the outset we invoke the rule that the municipality when operating upon its proprietary side, is to be regarded merely as a private corporation, and that we are in law dealing with two private corporations operating street railway systems.

In a controversy between these litigants (the appellant and the municipality) the Supreme Court of California said:

> "The case (is to be) considered, as in every proper judicial aspect it is, simply a controversy between two private street railroad litigants."
>
> United Railroads *vs.* Superior Court (1916), 172 Cal., 80, 82 (foot.)

Municipal corporations

> "exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a gov-

ernmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person."

Vilas *vs.* Manila (1911), 220 U. S., 345.

"For all the purposes of the construction of this underground railroad (the subway) it (the City of New York) became a railroad corporation, having no more rights in the highways and public places of the city than would belong to any other corporation, and with no other or higher right to take private property than would belong to an ordinary railroad corporation."

In re Board of Rapid Transit Commissioners (1908), 128 App. Div., 103; 112 N. Y. Supp., 619, 624.

"The city owns the subway, and it is a railroad corporation so far as the construction, operation, and leasing thereof is concerned. * * *
It was built by and belongs to the city as a proprietor, not as a sovereign. * * *
It can lawfully claim no immunity from liability, except such as would belong to a railroad company, engaged in a similar enterprise, under like circumstances. Although it was conducting a public work, it was such only and to the same extent as the building of a railroad by a private corporation is a public work."

In re Board of Rapid Transit Commissioners (1909), 197 N. Y., 81, 90 N. E., 456, 460, 464.

"In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi-public capacity."

South Pasadena *vs.* Pasadena Land Co. (1908), 152 Cal., 579, 592, 93 Pac., 490.

See also

South Carolina *vs.* U. S. (1905), 199 U. S., 436, 463;

Chafor *vs.* Long Beach (1917), 174 Cal., 478; 163 Pac., 670.

We come now to consider the nature of the property of which the complainant is possessed, and we claim such property rights only as are distinctly and unequivocally established by the decisions of the Supreme Court of California, by which this court will be controlled in the disposition of the question.

The leading case is Appeal of the North Beach & Mission R. R. Co. (1867), 32 Cal., 499, from which there is much but not full quotation in our brief, pp. 25 and 26. The case arose out of a proceeding for widening Kearny street in San Francisco. The Commissioners assessed the sum of $20,000 as benefits against the street railroad (appellant in the case) which was operating in that street. There were four questions presented on the appeal, with the first two of which only are we concerned.

The court states them to be (32 Cal., 505):

> Firstly, whether the appellant has any property, estate or interest within the district deemed benefited? Secondly, if so, whether such estate is capable of being enhanced in value in the proposed widening of Kearney Street, and whether, by means thereof, any substantial benefits can accrue to the company.

Both questions were answered on the appeal in the affirmative. The first question is discussed commencing with the last line of page 505, and running over to line 5 on page 513. The long quotation in our brief (pp. 25-26) is taken from the conclusion of the court's discussion of the first point.

The court next considers the second point, occupying in so doing from line 6 on page 513 to the foot of page 514, and embraced in this discussion is the matter quoted in our brief, page 26, foot.

The court holds that (1) a street railroad operating under a franchise has an easement in the street which is real property and taxable as such; (2) the franchise holder has an estate of substantially the same kind and of equal dignity before the law as an abutting proprietor; and (3) "whatever change in any particular street, therefore, will increase or diminish the travel in its cars, must, directly, in the same

ratio, increase or diminish the value of its easement—its estate in the particular street in which the change is made, and upon which such increase or diminution depends."

Los Angeles Co. *vs.* Hubbard (1911), 17 Cal. App., 646; 121 Pac., 306, is a case similar on the facts and similarly decided. (The Supreme Court denied a rehearing.)

(See Br., pp. 27, 28 for other California cases and cases elsewhere of similar effect.)

It will thus be seen that the Supreme Court of California, in respect of their property rights, has placed street railway proprietors upon the same plane as abutting owners. One of the property rights of an abutting owner guarded and protected in California and elsewhere is the right of ingress and egress to and from his property, without which the abutting owner would be deprived of the full enjoyment of his property. It is the established law in California that *the right of access is property*, and is protected by the constitutional provision against "taking" or "damaging," and this rule has been laid down and enforced in all of the cases in which it has arisen.

(See Br., p. 56, for California cases and pp. 56 to 58 for decisions elsewhere.)

It follows, then, that a right of safe and convenient access to the cars of a street railway is likewise a property right which inheres in every street railway franchise, because it is necessary to a full exercise and enjoyment of the franchise. Indeed, it is the right of all others which gives value and substance to the franchise.

See Brief for Appellant, pp. 29-31.

Morgan *vs.* Louisiana (1876), 93 U. S., 217.

Crocker *vs.* New York (1883), C. Ct. S. D., N. Y., Wheeler, D. J., 15 Fed., 405.

Langdon *vs.* New York (1882), 93 N. Y., 129.

Omaha Horse Ry. Co. *vs.* Cable Tramway Co. (1887), 30 Fed., 324; (1887), 32 Fed., 727; (1888), 33 Fed., 689.

San Francisco Ry. *vs.* Scott (1904), 142 Cal., 222, 229.

It is in order now to speak of the ideas which underlie the constitutional provision.

The decisions in California (and elsewhere) have frequently, and we might say almost invariably, involved cases where the public undertaking was entirely lawful, as in (*a*) Reardon *vs.* San Francisco (1885), 66 Cal., 492; 6 Pac., 317, involving the laying by the municipality of a sewer and the bringing of a street to grade, which inflicted damage upon the property of an abutting owner, and (*b*) Eachus *vs.* Los Angeles Ry. Co. (1894), 103 Cal., 614; 37 Pac., 750, involving the initial establishment of grade levels by the municipality, resulting in damage to the access of an abutting proprietor.

All the decisions in effect declare, and some of them declare in terms, that a constitutional provision prohibiting "damage" of private property for public use

> "means to cover cases where damages are caused by acts that are legal and entirely within the powers of the corporation performing them, but in the doing of which, for the benefit of the public, private property is damaged."
>
> Lake Erie R. Co. *vs.* Scott (1890), 132 Ill., 429; 24 N. E., 78.

> "If the public desire to erect works for public use, then the public, the party benefited, must bear the burden" and not impose it upon the property owner.
>
> Gillespie *vs.* South Omaha (1907), 79 Neb., 441; 112 N. W., 582.

> "While public improvements are essential to progress and to the welfare of the race, yet, as the public are to receive the benefits, whether by the opening of streets and public grounds *or by the construction of railways*, the party receiving the benefit should bear the burden. This should not be cast upon others."
>
> Mason Co. *vs.* Wolf (1906, 8th C.), 148 Fed., 961, 963.

"The growing necessities of a progressive age must be met by the exercise of the * * * power of eminent domain.

Petition of Philadelphia St. Ry. Co. (1902), 203 Pa., 354; 53 Atl., 191.

Langdon *vs.* New York (1883), 93 N. Y., 129, 157.

People *vs.* Elk River Mill Co. (1895), 107 Cal., 221, 227.

It is true that the constitutional provision is sometimes dealt with in connection with nuisances (or what might have been nuisances in the absence of statutory authority) as in Richards *vs.* Washington Terminal Co. (1914), 233 U. S., 546.

In some jurisdictions it has been said (see Dana *vs.* Rock Creek Co. (1896), 7 App. D. C., 482, 492-3) that municipal governments performing public functions, as in grading, changing and improving streets, are not liable for these damages, while private corporations using the streets in an extraordinary manner for private profit are liable. No such distinction exists in California, and it is doubtful if it exists in *any* of the States in which the Constitution prohibits the damaging of property without just compensation.

Furthermore, the distinction above noted would not apply in the present case, for we are dealing with a municipality on its purely trading and proprietary side, and it could not draw upon its governmental attributes for immunity from liability.

The physical and longitudinal interference with access in the present case is an injury peculiar to the property here involved, and brings the appellant's case under the operation and within the protection of the constitutional guarantee against "damaging."

Brief for Appellant, pp. 53, 63, for California cases so holding.

Omaha Horse Co. *vs.* Cable Co. (1887, C. C. Neb., Brewer, C. J.), 30 Fed., 324.

Omaha Horse Co. *vs.* Cable Co. (1887, C. C. Neb., Brewer, C. J.), 32 Fed., 727.

Omaha Horse Co. *vs.* Cable Co. (1888, C. C. Neb., Brewer, C. J.), 33 Fed., 689.

Cable Co. *vs.* Omaha Horse Co. (1891), 140 U. S., 692 (dismissed upon stipulation).

Omaha Horse Co. *vs.* Cable Co. (1891), 140 U. S., 674 (dismissed upon stipulation).

Taylor *vs.* Chicago (1887), 125 U. S., 98.

Richards *vs.* Washington Terminal Co. (1914), 233 U. S., 546.

Crocker *vs.* City of New York (1883, C. Ct., S. D. N. Y., Wheeler, D. J.), 15 Fed., 405.

"If by the construction of a railway or other public work *an injury peculiar to a given property* be inflicted upon it * * * then said property may be said to be *damaged.*"

Gainesville R. Co. vs. Hall (1890), 78 Tex., 169; 14 S. W., 259.

It is appropriate now to review the points taken by the appellees here or below in answer to our claim that we are entitled to an injunction against the damaging of our property.

The contentions of the appellees may be said to be sixfold:

(*a*) That by the express terms of the franchise it was made subject to legislation justifying the conduct of the municipality here involved.

(*b*) That the franchise is to be so construed as to carry *by implication* an agreement by the appellant that it should be subject to "all the reasonable and necessary incidents flowing from the operation" of a second street railway line, whether operated by the municipality or by a private corporation authorized under grant from the municipality.

(*c*) That the franchise was always subject to the police power, and that the action of the municipality here challenged is referable to the police power;

(*d*) That under the well-known reserved right to alter, amend or repeal, the municipality is possessed of authority, notwithstanding the franchise, to work its impairment or even its destruction by the ordinances authorizing the construction and operation of street railroads here challenged.

(*e*) That appellant has no "private" property which will be damaged; and, finally,

(*f*) That no injury suffered by appellant is actionable, because the city's railway is not a new servitude upon the street.

We deal with these positions taken by the appellees in the order stated.

The first turns upon the language of section 2 of the franchise, which, however, should be read with section 5. They are as follows (R., p. 23):

> "Section 2. Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by said company, upon such terms, conditions and restrictions are are now imposed, or may hereafter be imposed, by the laws of the State of California, and especially the terms, conditions and restrictions imposed by the 498th and 500th and 502d sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said Company with all of the provisions of said laws is hereby required."
>
> "Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and

> conditions specified in the 499th section of the Civil Code of this State. This section shall apply to persons and companies, as well as corporations."

In reading the two sections above quoted, it is to be observed that the legislation spoken of in section 2 has to do only with the "manner of constructing and maintaining street railroads," that the "terms, conditions and restrictions" there spoken of are of the type mentioned in the enumerated sections of the Civil Code, and that it is plainly contemplated that section 499 of the Civil Code as then in force should be a part of the contract.

It is clear from an examination of these sections that they have neither the meaning nor the effect attributed to them by the appellees. (See Detroit *vs.* Detroit Ry. Co. (1902), 184 U. S., 368-372, foot 384-385; Owensboro *vs.* Cumberland Telephone Co. (1912), 230 U. S., 58; also Grand Trunk Ry. Co. *vs.* South Bend (1913), 227 U. S., 544, quoted from in brief for appellant, pp. 121-123.)

We come now to the point that our franchise is to be so construed as to carry by implication an agreement by the appellant that it should be subject to "all the reasonable and necessary incidents flowing from the operation" of a second street railway line, whether operated by the municipality or by a private corporation authorized under grant from the municipality. This argument of the appellee, in our opinion, reverses the logic applicable to the case. We insist that all the reasonable and necessary incidents to the enjoyment of the first franchise are to be protected, and that any act contemplated by the State or municipality in derogation of those incidents involve an impairment of the obligation of the contract, and amounts to either a taking or damaging of property, or both.

> "It will never be presumed that reasonable men accepted a grant carrying with it so comprehensive a negation. It is against the rules, both of law and of reason, to admit by implication in the construction

of a contract a principle which goes in destruction of it."

Murray *vs.* Charleston (1877), 96 U. S., 432.

See also

Pumpelly *vs.* Green Bay Co. (1871), 13 Wall., 166, 182.

Eachus *vs.* Los Angeles Ry. Co. (1894), 103 Cal., 614.

Omaha Water Co. *vs.* Omaha (1906, 8th C.), 147 Fed., 1, 13-14.

Airline Ry. *vs.* R. R. Commission (1907, C. C., D. Ala.), 155 Fed., 792, 802-803.

Dealing with the appellee's contention that the ordinances here complained of are referable to the police power, and that the franchise of the appellant was subject to the exercise of the police power, we answer, first, that the action here involved is not referable to the police power (Br., pp. 136-143—particularly Los Angeles Gas Co. *vs.* Los Angeles (1917, S. D. Cal.), 241 Fed., 912). And furthermore, the police power cannot be drawn upon for the accomplishment of the destruction and damage of the property of the appellant. (See Br., pp. 121-127.)

The contention of the appellee made below, that the municipal action here challenged was justifiable under the constitutionally reserved power to amend, alter and repeal, is sufficiently dealt with in our brief, pages 128-131, and in addition, the municipality is not authorized to exercise the constitutionally secured right of amendment, alteration and repeal.

The appellee's argument that the appellant has no "private" property which is being damaged has already been answered (*supra*, pp. 10, 11).

To the appellee's argument, based upon the contention that the city's railway is not a new servitude upon the street,

we answer that that fact is immaterial (Fairchild *vs.* Oakland Ry. Co. (1917, Col. Sup. Ct.) 167 Pac., 388).

Having now dealt with the theories upon which we rely for an injunction against the damaging of our property without compensation first paid, and having likewise considered the contentions of the appellees in reply thereto, we pass to another point.

We come now to the question whether there is a "taking" of the complainant's property. This matter is discussed in our Brief, pages 45 to 51, and we rely upon the authorities there found, notably Pacific Telephone Co. *vs.* Eshleman (1913), 166 Cal., 640, 665; 137 Pac., 1119, 1127.

At page 47 of our brief we call attention to a note in Lawyers' Reports, Annotated, in which it will be found that the preponderance and weight of authority declare that wherever a right of access to property is held to be property itself, the cutting off or impairment of such access is a "taking" of property. This is precisely our case.

We come now to our proposition that the plans of the municipality here sought to be enjoined are so in derogation of the substance of the grant that this fact, without more, gives rise to the application of the impairment of contract clause.

One of the chief features in this case is an inconsistency of argumentation which may be the better understood if both angles of approach be stated.

The appellant claiming by grant insists that it is unlawful upon the part of the grantor (whether State or municipality) to do any act inconsistent with the grant (substantially impairing the exercise or enjoyment thereof) and that hence it is of first and controlling importance to consider what is involved in the grant, and having ascertained that fact therewith to weigh the plans of the municipality.

On the other hand, the municipality argues that it "reserved" the right of competition, and that any act done in the enjoyment of the municipality's so-called right of competition is lawful, even if it impair, and possibly if it destroy, all property rights claimed by appellant under its franchise.

In no true sense did the municipality "reserve" any right of competition. If, after the grant, the municipality had authority to compete, that authority is not referable to a "reservation."

Moreover, if the municipality has authority to compete, its power to compete exists abstractly and cannot be applied concretely, unless it is *merely* competition when so applied concretely. Circumstances might exist, the *locus* might be peculiar, competition abstractly considered when applied concretely might work destruction of rights already vested. In these events the municipality would be without authority to compete, using that word as involving destruction of the property of others when competition is applied concretely to a particular case.

These views are in accordance with all the authorities which do with the unlawfulness of derogating from one's own grant. (See Brief, pp. 30, top, and 41; Crocker *vs.* City of New York (1883, C. Ct., S. D. N. Y., Wheeler, D. J.), 15 Fed., 405.

If, therefore, the grantor of this franchise, State or municipality, having conveyed to the appellant certain property rights, seeks now by the ordinances here under review to derogate from the grantee's enjoyment of the things conveyed, a case of impairment of contract is presented.

We come now to the contention of appellant that it has an exclusive franchise on Market street for the entire length thereof, in excess of five blocks, in view of section 499 of the Civil Code of California, effective January 1, 1873, in force at the time of the granting of the franchise of 1879 and 1882, the text whereof appears hereinabove and in the Appendix to Brief for Appellant.

This question gives rise at the outset to two considerations highly important to the discussion (*a*) whether the term "railroad corporations" in section 499 covers municipal corporations operating railroads and (*b*) whether the section entered into our franchise as a part thereof.

We have already shown that the term "railroad corporation" does embrace municipal corporations operating railroads, and we therefore pass from question (*a*) to question (*b*) just stated.

Did the provisions of section 499, Civil Code, enter into the appellant's franchise when granted in 1879?

Pacific Ry. Co. *vs.* Wade (1891), 91 Cal., 449, 27 Pac., 768, involved two street railways in Los Angeles. The grantee of the *first* franchise, which was for a cable road, had built its tracks and was operating its cars thereon. The grantee of the *second* franchise, which was for an electric road, wished to intersect the tracks of the cable road "and run along the same for a distance of *three* blocks." The court held that the electric road was entitled to do so, saying:

> "The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. * * * The right * * * of the mayor and council to grant to another street car company a franchise to connect with its track, and to use the same for a distance not exceeding five blocks, *entered into its contract with the city,* as fully, under the provisions of section 499, Civil Code, *then in force,* as if the condition had been expressly stated in the grant."

(The significance of the words *"then in force"* will be made the more apparent if it be noted that (*a*) the above decision was rendered September 30, 1891; (*b*) section 499, Civil Code, had been amended February 25 1891, as shown in Appendix to Brief for Appellant, p. v; and (*c*) the section as thus amended is quoted in the above decision. Note, also, that in the instant case the franchise expressly incorporates section 499, Civil Code (R., 23).

In Los Angeles Ry. Co. *vs.* Los Angeles (1907), 152 Cal., 242; 92 Pac., 490, it was held that the provisions of section 502 of the Civil Code entered into and became a part of all street railway franchises, and it was held by the Supreme Court of California, in St. Helena *vs.* San Francisco Ry. Co. (1914), 24 Cal. App., 71; 140 Pac., 600, in denying a rehearing, that section 498 of the Civil Code entered into and became a "constituent part of the contract granting the franchise, though not expressed therein in terms."

If, however, we are not to abide by these decisions of the Supreme Court of California, but deal with the matter as a practically open question, we shall come to the same end.

Section 499 presents a question which should be stated, (although its resolution either way will not affect the question in hand), *i. e.,* does section 499 of the Civil Code, in form from 1873 to 1891, totally forbid a second operation (by a different management) on independent tracks for any distance whatever, and permit such an operation on the same tracks for five blocks only. It is not disputed that it forbids a second operation under a different management for a greater distance than five blocks (See People *vs.* Rich (1879) 54 Cal., 74), and the question just suggested is whether the second operation is to be upon the same tracks or upon different tracks, or upon either* •

The obvious meaning of section 499 is that a franchise for the first operation on the street shall be subject to a second operation on the same street by a different proprietor, upon the conditions specified in the section, as restricted by the limitation therein contained. The obvious purpose of the section, in the light of its history, and as sharply defined by later amendments, was to prevent not four tracks upon the street but *to prevent two operations by different proprietors,* except under the circumstances and upon the conditions specified in the section, subject always to the limitations

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* See "Review of Decisions in California" bearing upon the interpretation of Section 499, Civil Code, California, and earlier footnote on this subject.

therein contained. The fact that the section did not limit the amount of operation by a single proprietor, is clear evidence that the provision creating the five blocks limitation was designed to protect the grantee of the first franchise. It is evident that it was so understood at the time of the granting of our franchise, for it is provided therein that the franchise shall subsist "upon the terms and conditions specified in the 499th section of the Civil Code of this State, Br., p. 77, quoting R., 23.

In our brief we have called attention to the cases which hold that under similar circumstances statutes enter into the contract (Br., pp. 80-83).

See also

McCracken *vs.* Hayward (1844), 2 How., 608.
Airline Ry. *vs.* R. R. Commission (1907), 155 Fed., 792.
Crocker *vs.* New York (1883), 15 Fed., 405.
Langdon *vs.* New York (1883), 93 N. Y., 129.
Boston Corporation *vs.* Salem R. R. (1854), 2 Gray, 1, 29.

In the court below the appellees relied with great confidence on Knoxville Water Co. *vs.* Knoxville, and kindred cases, and the decision below rests partly thereon.

We have discussed the Knoxville case and another in our brief, pp. 150-155, but a word or two may be appropriately added here.

The Knoxville case and kindred cases involve the interpretation of writings. No one case can be said to be controlled by another case involving the interpretation of writings, the clauses not being the same and the surrounding circumstances drawn upon for interpretation not being the same.

The principles invoked in the Knoxville case are unchallenged law everywhere, and it is not too much to say that this court did not divide in the Knoxville case upon the soundness of the principles invoked, but upon the applica-

tion of those principles in the interpretation of the contract between the parties there involved.

It is furthermore to be said, speaking of the Knoxville case, that in the instant case we are interpreting not the act of a contracting municipality but an enactment of the law-making power of the State, and the question is, does the language employed by the law-making power in dealing with "railroad corporations" include municipal corporations when they are operating as railroad corporations.

In the Knoxville case this court was dealing with a contract, in the preparation of which both parties took part, the language of which was attributable to both. In the present case we are dealing with an enactment of the legislature, in which the appellant took no part, and the language of which is in no wise attributable to the appellant. (See Knoxville Water Co. *vs.* Knoxville (1906), 189 U. S., 434; Omaha Water Co. *vs.* Omaha (1906, 8th C.), 147 Fed., 1, 13-14.)

The question here is whether an enactment of the legislature of the State, dealing with railroad corporations, applies to a municipal corporation when transacting the business of a railroad corporation.

The Knoxville case and the case at bar, we submit, afford no analogy.

If section 499, Civil Code, does apply to a municipal corporation when transacting the business of a railroad corporation, and if section 499 is a part of our franchise, the Knoxville case can play no part in the disposition of the case; on the other hand, if section 499 does not apply to municipal corporations when operating as railroad corporations, or if so applying is not a part of our franchise, we have failed to make out our case so far as it rests upon our contention that we have an exclusive franchise, quite regardless of the Knoxville decision.

The questions already considered by us are the leading questions in the case, but there are others, including the one

in reference to the taking or damaging of property by crossing our tracks, with which we would care to deal.

The limitations of time, however, forbid the discussion of other questions.

We must leave them, including the question of crossing, upon the arguments and authorities in our brief, adding, however, that it is decided in Boca R. R. Co. *vs.* Sierra Valley R. R. (1905), 2 Cal. App., 546; 84 Pac., 298, that the right of one railroad to cross the tracks of another can only be obtained in an eminent domain proceeding upon compensation paid.

GARRET W. McENERNEY,
Counsel for Appellant.

WASHINGTON, D. C., March 24, 1919.

INDEX.

	Page
Statement of facts	1
Transportation problem facing the city at the time this action was instituted	6
Points and authorities	13
Argument	18
Two governing principles running throughout the entire case	19
The city is not precluded from operating its own street railways because of the terms of Section 5 of complainant's franchise	20
Neither the words "railroad corporations" nor the words "persons and companies as well as corporations" as used in Section 499, or in Section 5 of the franchise, include municipalities within their terms	21
The city was not vested with power to grant exclusive franchises and, therefore, could not make the grant exclusive against itself or against persons, companies or corporations.	28
The city is not excluded from the use of the streets for railway purposes by Section 499 of the Civil Code	33
The police power of the State may be exercised in the interest of public welfare, convenience and necessity, as well as in the interest of public health, morals and safety	38
Complainant's rights, if any, under Section 499 of the Civil Code are measured by the present form of that section and not by its terms as they existed in 1879 when complainant's franchise was granted	45
Grants of franchises and special privileges are construed strictly in favor of the public	49
Crossing of complainant's tracks not a taking or damaging of property without due process of law and does not require that compensation be first paid	54
I. It is a general rule of law that the lines of one street railway may cross the lines of another without compensation	54
II. Construction of Section 500 of the Civil Code	60
III. Construction of Section 510 of the Civil Code	64
Public convenience and necessity demanded that the city take the action it did	71
The soliciting of offers of sale of an existing street railroad satisfied the requirements of Art. XII of the charter	75

Page

I.

Answer to appellant..... 77
No property of appellant is taken or damaged by the building and operation of the municipal road on Market street..... 77

II.

The cases cited by counsel for complainant in addition to the Omaha case do not support their contention that property of complainant is damaged contra to the constitutional guaranty 95

III.

The Omaha case discussed..... 103

IV.

Appellant's franchise was not exclusive and never became exclusive either in whole or in part..... 112

TABLE OF CASES CITED.

Abilene Nat. Bank vs. Dolley, 228 U. S.....
Am. & Eng. Ency. (2d Ed.), Vol. 27, p. 24..... 17
Atlantic Coast Line vs. Goldsboro, 232 U. S., 548, 555..... 117
Bacon vs. Walker, 204 U. S., 311, 317..... 118
Baltimore vs. Baltimore T. & G. Co., 166 U. S., 673..... 49
Bienville Water Co. vs. Mobile, 175 U. S., 109..... 14
Birmingham Traction Co. vs. Birmingham Railroad Co., 1898, 119 Ala., 24 S. O., 368..... 69
Blair vs. Chicago, 201 U. S., 400-472; 50 L. Ed., 801-831..... 13
Boise City vs. Boise Water Co., 186 Fed., 705..... 13
Belmont Bridge Co. vs. Wheeling Bridge Co., 138 U. S., 287..... 116
Butterfield vs. Stranahan, 192 U. S., 470, 493..... 117
Camfield vs. U. S., 167 U. S., 524; 42 L. Ed., 262..... 16
Central Trust Co. vs. Municipal Traction Co., 169 Fed., 308..... 14
Charles River Bridge vs. Warren Bridge, 36 U. S., 11 Pet., 420.. 119
Chehalis vs. Washington-Oregon Corp., 202 Fed., 591..... 25
Chicago, B. & Q. Ry. Co. vs. Nebraska, 170 U. S., 57..... 41-42
Clark vs. City of Los Angeles, 160 Cal., 30..... 15
Cleveland Electric Ry. Co. vs. Cleveland, 204 U. S., 130; 51 L. Ed., 405..... 14
Chicago, etc., Railway Co. vs. Chicago Street Railway Co., 47 Am. State Reports, 264..... 98
Chicago & Alton R. R. vs. Tranbarger, 238 U. S., 67, 78..... 117

Page

Chicago, Burlington, etc., R. R. vs. Chicago, 166 U. S., 226, 255.. 118
C., B. & Q. Ry. vs. Drainage Commissioners, 200 U. S., 561, 592. 16
Comm'rs Lunatic Asylum, Eq. Series 366, Reg. vs. Stock, 82 Ad. & E., 405 70
Consolidated Traction Company vs. South Orange, etc., Traction Co., 56 N. J. Eq., 569 ..... 17, 55, 97
Coosaw Min. Co. vs. South Carolina, 144 U. S., 550 52
Covington and Lexington Turnpike Road Co. vs. Sanford, 164 U. S., 578; 41 L. Ed., 560 14
Curtis vs. Whitney, 13 Wall., 68; 20 L. Ed., 513 14
Danville Water Co. vs. Danville, 180 U. S., 619; 45 L. Ed., 697.. 14
Detroit Citizens' Street R. Co. vs. Detroit R. R., 171 U. S., 48; 43 L. Ed., 67 ..... 14, 29
Freeport Water Co. vs. Freeport, 180 U. S., 587; 45 L. Ed., 679.. 14
German Alliance Ins. Co. vs. Lewis, 233 U. S., 389; 58 L. Ed., 1011 ..... 16, 39
Glenwood Springs vs. Glenwood L. & W. Co., 202 Fed., 678; L. R. A. (1915 C), 438 and note 15
Greenspar vs. Oliver, 149 N. Y. Supp., 752 45
Gross vs. United States Mortgage Co., 108 U. S., 477, 488 117
Hadacheck vs. Los Angeles, 239 U. S., 394 118
Hamilton Traction Co. vs. Hamilton Transit Co., 690 Ohio State, 492; 692 N. E., 991–994 15
Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 268; 36 L. E., 963 ..... 23, 108
Heasley Case 55
Helena Water Works vs. Helena, 195 U. S., 383 15
Hinchman Case 55
Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S., 264; 53 Law Ed., 176 ..... 14, 31
House vs. Mayes, etc., 219 U. S., 270 41
Jackson County Horse Rd. Co. vs. Interstate Rapid Transfer Ry. Co., 24 Fed., 306 14
Joplin vs. Southwest Missouri Light Co., 191 U. S., 150; 48 L. Ed., 127 14
Kansas City, St. Joseph and Council Bluffs R. R. Co. vs. St. Joseph Terminal R. R. Co., Appellant, 97 Mo., 457 ..... 87, 102
Knoxville Water Co. vs. Knoxville, 200 U. S., 22–34; 50 L. Ed., 353–359 ..... 13, 21, 51
Lake Shore & Mich. So. Ry. vs. Ohio, 173 U. S., 285, 292 .....
Lehigh Water Co. vs. Easton, 121 U. S., 388–390; 30 L. Ed., 1059. 15, 24
Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685; 41 L. Ed., 1165 14
Madera Water Works vs. Madera, 228 U. S., 454; 185 Fed., 281; 57 L. Ed., 915 ..... 13, 52

Page

Manigault vs. Springs, 199 U. S., 473 ..... 16, 41
Market Street Rt. Co. vs. The Central Ry. Co., 51 Cal., 583 .. 60, 63, 97
Mayor, etc., of the City of Meridian vs. Farmers' Loan and Trust Co., 193 Fed., 67 15
Mayor, etc., vs. Farmers' L. & T. Co., 143 Fed., 71 105
Mintuin vs. Larue, 64 U. S., 23 30
Morris and Essex Railroad Case 55
Munn vs. Illinois, 94 U. S., 113, 134 117
Martin vs. Pittsburgh, etc., R. R., 203 U. S., 284, 294 117
N. B. & M. M. R. R., 32 Cal., 510 102
Nellis on Street Railways, Vol. 1, p. 254, Sec. 108 17
New Orleans Gaslight Co. vs. Louisiana Light, etc. Co., 115 U. S., 650 49
Noble State Bank vs. Haskell, 219 U. S., 110; 58 L. Ed., 116 .... 16, 38
N. Y. & N. E. R. R. Co. vs. Bristol, 151 U. S., 556; 38 L. Ed., 269. 46
The New York and Harlem R. R. Co. vs. The 42nd St., etc., R. R. Co., 50 Barb., 285 ..... 85, 87, 102
New Orleans Gas Co. vs. Drainage Commissioners, 197 U. S., 453, 462 118
Omaha Horse Railway Co. vs. Cable Tramway Co., 32 Fed., 727. 69, 95
Oregon R. & Nav. Co. vs. Oregonian R. Co., 130 U. S., 1, 26 51
Owensboro vs. Cumberland Tel., etc., 230 U. S., 58 14
Pittsburgh, Virginia & Charleston Reading Co. vs. Vance, 115 Pa., 325, 18 Atl., 764 ..... 108, 109
People vs. Roper, 35 N. Y., 629 46
Piscataqua Bridge vs. New Hampshire Bridge, 7 N. H., 35 25
Platt vs. City and County of San Francisco, 158 Cal., 74, 86 .... 18, 77
Puget Sound Traction Co. vs. Tacoma, 217 Fed., 205 15
Pennsylvania R. R. vs. Miller, 132 U. S., 73, 83 117
Railroad vs. Railroad, 97 Mo., 457 92
Rail & River Coal Co. vs. Yaple, 214 Fed., 273 16
Rector, etc., of Christ Church, Philadelphia vs. County of Philadelphia, 24 How., 300 46
Rogers Park Water Co. vs. Fergus, 180 U. S., 624; 45 L. Ed. 702. 14
San Francisco vs. McGovern, 28 Cal. App., 511 15
San Jose-Los Gatos, etc., Ry. vs. San Jose Ry. Co., 156 Fed., 458 ..... 16, 36, 113
Seattle Electric Co. vs. Seattle, etc., R. R. Co., 185 Fed., 371 15
Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354; 46 L. Ed. 585 15
Slidell vs. Grandjean, 111 U. S., 412 52
St. Clair County Turnpike Co. vs. Illinois, 96 U. S., 63; 24 L. Ed., 651 51
St. Louis Transfer Ry. Co. vs. The St. Louis Merchants Bridge Ry. Co., 111 Mo., 666 ..... 91, 102

Page

Southern Ry. Co. vs. Atlanta Ry. and Power Co., 36 S. E., Reporter 873 100
Tillamook Water Co. vs. Tillamook, 139 Fed., 406; 150 Fed., 119 13, 50
Turnpike Co. vs. Maryland, 70 U. S., 3 Wall., 210..... 25
Vicksburg vs. Vicksburg Waterworks Co., 202 U. S., 453..... 53
Vincent Brothers vs. N. Y. R. Co. (1904), 17 Conn., 431; 59 Atl., 491 110
Washington-Oregon Corp. vs. Chehalis, 202 Fed., 591..... 15, 25
Water, Light & Gas Co. vs. Hutchinson, 207 U. S., 393; 52 L. Ed. 257 ..... 14, 105
West Jersey Railroad Case..... 55
Williams vs. Wingo, 177 U. S., 601..... 15, 46
Wright vs. Nagle, 101 U. S., 791..... 14

OTHER CITATIONS.

Booth on Street Railways, 2 Ed., Sec. 108..... 82
Charter, San Francisco, Art. II, Chap. II, Sec. 1, Par. 2..... 20
Civil Code: Section 467..... 65
468..... 65
470..... 65
473..... 66
477..... 65
481..... 66
482..... 66
483..... 66
484..... 66
485..... 66
485A..... 66
486..... 67
494..... 67
469..... 62
490..... 2, 34, 35
500..... 17, 61
510..... 64
497..... 29
Constitution of California, Article XI, Sec. 19..... 21
Dillon on Municipal Corporations, 5 Ed., Sec. 1241..... 14, 79
Lewis on Eminent Domain (3d Ed.), Vol. II, Sec. 424, page 768 ..... 17, 59, 97
Nelles on Street Railways, Vol. I, Sec. 108, p. 254..... 17, 58, 97
R. C. L., Vol. XII, page 188..... 30

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 282.

UNITED RAILROADS OF SAN FRANCISCO,
APPELLANT (COMPLAINANT BELOW),

vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL.,
APPELLEES (DEFENDANTS BELOW).

BRIEF FOR APPELLEES.

Statement of Facts.

Complainant is the successor in interest of the Market Street Railway Company, to which company a franchise was granted by the City and County of San Francisco, on September 20, 1879, granting to said company, its successors and assigns, the right to construct, lay down, maintain and operate, for the term of fifty years, a single or double track street railroad, with all the necessary switches and turnouts, along certain streets in San Francisco, including Market street, from the City Front to Seventeenth street.

The sections of said franchise which are material to this controversy are as follows:

> "Section 2. Except as herein otherwise provided, the rights and privileges mentioned in the foregoing

section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by said company, *upon such terms, conditions and restrictions as are now imposed, or may hereafter be imposed, by the laws of the State of California,* and especially the terms, conditions, and restrictions imposed by the 498th and 500th and 502d sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said company with all of the provisions of said laws is hereby required."

"Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this State. This section shall apply *to persons and companies, as well as corporations.*"

"Section 12. Said railway company is hereby required to file in the office of the Clerk of the Board of Supervisors of the City and County of San Francisco, an acceptance, in writing, of the provisions of this order, under its corporate seal, signed by its President and countersigned by its Secretary, and thereupon the provisions of this order shall be taken and deemed to be a contract between said Company and said City and County. Unless such acceptance be filed within ten days after the passage of this order, this order shall become and remain null and void."

At the time the aforesaid franchise was granted section 499 of the Civil Code of the State of California read as follows:

"499. Two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

The above section was amended in 1891, 1907, and 1911. The several amendments are set forth in full in appendix to appellant's brief. The section as last amended and in force since 1911 is as follows:

> "The legislative body of any incorporated city, city and county, or town, may permit two or more lines of street railway to use the same portion of the same street or the same tracks upon such terms as may be agreed upon by the companies operating such railways, but no permission shall be granted to one company to use the same tracks or portions of the same street for a distance of more than five consecutive blocks without the consent of the person or company occupying said portion of street and then only upon payment of an equal portion of the cost of construction of the tracks and appurtenances used by such railways jointly; *provided that any incorporated city, city and county, or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits for any number of blocks* upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation, of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitations before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

Prior to the commencement of this action, complainant and its predecessors in interest had constructed a double-

track street railroad on Market street, from the City Front to Seventeenth street. At the time of the commencement of said action complainant was in possession of such railroad and was operating the same by means of the overhead electric trolley system.

Lower Market street, from the City Front to Geary street, a distance of more than five blocks, was, prior to the commencement of this action, and now is, occupied by four parallel tracks, the two outer being used jointly by complainant and the City and County of San Francisco, under an agreement between them, which agreement has been introduced in evidence herein (Tr., 324). The remainder of Market street, from Geary and Kearny streets to Seventeenth street, was at the time this action was commenced occupied only by the two tracks of complainant.

In 1912 the City and County of San Francisco commenced the operation of a municipal street railroad system. The municipal system has been gradually developed and enlarged until it now covers approximately forty-three miles of single-track construction. In further development of such system the city proposed at the time of the commencement of this action to lay outer tracks on that portion of Market street which had but two tracks, and to operate on such tracks the cars of its municipal system on either side of the tracks of complainant.

The lines of the municipal system to be thus developed and created are the following, viz:

First. The so-called Van Ness Avenue and Church Street line, which traverses Van Ness avenue to Market street, thence on Market street between Van Ness avenue and the intersection of Market street and Church street, thence on Church street to a terminal at Thirtieth and Church streets.

Second. The so-called Tunnel line, which, using the existing tracks of the so-called Geary Street line from the Ferry to Geary and Market streets, traverses Market street from the Ferry to the intersection of Seventeenth, Castro and Market streets, which point is the easterly portal of the Twin Peaks

Tunnel, thence through the tunnel to terminals west of Twin Peaks. On that portion of Market street between Van Ness avenue and Church street the cars of the Tunnel line use the same track on which the cars of the Van Ness and Church Street line are operated. Subsequently, in this brief a more detailed description of these lines, as well as the purpose thereof, will be outlined. [For a map showing the routes and streets over which these lines traverse, see map between 284 and 285 Tr.]

The city was beginning the construction of the first portion of these lines on Market Street line when this action was commenced. A temporary restraining order was issued enjoining such construction, which was dissolved at the trial. The purpose of the action is to permanently enjoin the construction by the city of any additional tracks on Market street. The relief asked is that the city be enjoined from constructing the proposed branches of its municipal railway upon Market street and the other streets described in the bill of complaint, and also be enjoined from cutting the tracks of complainant which join its intersecting lines with its main line on Market street.

The answer of the city and its officers admits the purpose of the city to construct and operate the lines of street railway, as above set forth, but denies the alleged facts as to blanketing the complainant's cars and denies any taking of complainant's property or any impairment of the obligation of complainant's contract. The answer further sets forth certain facts showing the necessity for the construction of the tracks of the municipal railway on Market street as proposed.

Such necessity is admitted in paragraph XXIX of complainant's amended bill of complaint in the following language:

> "If the defendant City and County of San Francisco builds and completes its proposed line on Church street and Market street, between Church street and Van Ness avenue, connecting therewith its line on Van Ness avenue, it will serve a territory

which is densely populated, and if it builds and completes its proposed line on Market street, between Kearny street and Van Ness avenue, connecting with its proposed Church street and Van Ness avenue line, it will, upon the completion of a tunnel through Twin Peaks, now in course of construction, and through which it is proposed to build a street railroad line, serve territory of said city and county which is now without direct service to Market street, and which is already well populated, and in which the population is rapidly increasing."

Transportation Problem Facing the City at the Time This Action Was Instituted.

At the outset we desire to present the serious transportation problem facing the City and County of San Francisco at the time the city determined to build the lines complained of. We believe it is important that the court should comprehend this situation then existing, for we shall hereafter present argument supporting the action taken by the city, and that taken by the State in amending section 499 of the Civil Code, as proper exercises of the police power of the municipality and the State in furtherance of the public welfare. The existing situation shows that the action taken was not arbitrary or unjust, but was demanded by the public interest and welfare.

San Francisco is built upon the northern end of a hilly peninsula. The street plan was laid out to meet the peculiar topography of the city and to furnish highways for traffic leading from the doorway of the city—the ferry terminals at the foot of Market street. This street plan is best observed by an examination of the map showing the lines of the United Railroads and of the Municipal Railways at page 284 of the transcript of record.

A very large proportion of the people entering or leaving the city do so by way of Market street. This street extends in a general northeasterly and southwesterly direction

through the heart of the business section. The streets on the northwesterly side of Market street extend in northerly and southerly and easterly and westerly directions, the street lines forming acute angles with Market street on the first intersecting side. The natural topography of the city, with the street plan as shown, has resulted in making Market street the great artery of traffic and activity of the city. Probably no other large city in this country is so dependent upon one central street as is San Francisco.

The street was laid out with considerable forethought for the future traffic. Its width between property lines is 120 feet and from curb to curb 76 feet. With the municipal tracks, there are now four tracks of street railway on the street. The distance from the curb to the nearest rail of the outer track is 18½ feet (Tr., 91, 92). The growth and development of San Francisco has been rapid and extensive. Since the adoption of order number 1514, granting to the Market Street Railway Company of San Francisco the right to operate a street railroad on Market street, the section of the city on the northwesterly side of Market street and most of that portion north of Golden Gate Park has been closely built up. Portions of the Sunset district south of Golden Gate Park are heavily populated and rapidly growing. New residence tracts, known as Forest Hill, St. Francis Wood, Claremont Court, Merritt Terrace, El Portal Tract, and others have been laid out and some of them extensively developed in the section designated on the map referred to as Rancho San Miguel (Tr., page 278). Ingleside Terrace district lies immediately south of the Rancho San Miguel. Parkside Tract lies north of Rancho Laguna de la Merced and was developed as a residence district a number of years ago, but not rapidly settled up because of the lack of adequate transportation facilities. The testimony of A. S. Baldwin, a witness for defendants (Tr., pages 278 to 282), describes the growth and development of these outlying districts.

Street car transportation from this section of the city was

by circuitous routes until the city constructed a tunnel approximately 12,000 feet in length under the range of hills separating this section from the heavily built business district down town. The cost of this tunnel, amounting to approximately four millions of dollars, was paid for through assessments levied on the property within a district formed for that purpose. The greater portion of this tax was paid by the property owners to the west of the range of hills through which Twin Peaks Tunnel was bored.

The Church street line built by the city connects with Van Ness avenue line by tracks laid on Market street. This line reaches into a district formerly suffering from lack of transportation facilities. (Testimony of M. M. O'Shaughnessy, City Engineer, Tr., page 286).

The necessity for furnishing better street railway transportation on Market street and to these residence districts is shown by the testimony of a number of witnesses. City Engineer O'Shaughnessy testified relative to the district served by the Church street line as follows:

> "The Church street line figures prominently for two reasons: One is that it covers a district where present lines are very remote, an undeveloped section; secondly, it is the only street with feasible grades north and south that is not occupied by an existing franchise. It was the only gate or doorway that was open to the city to build a street railway in this section of the city, and the people from this section came into the Board of Supervisors when we were considering the construction and extension of railway lines and demanded that they get better service in that section and that the city build a line there.
>
> "With reference to the adequacy of street railway service in that section at certain times in the day—in the morning and in the evening—the conditions four years ago were practically intolerable. The people could not get to or from their work on account of the congestion on the cars and there was a demand for relief from the city authorities. * * *

"Having particular reference to the Church street line, it is proposed by the city to extend this line from its present terminus at Sixteenth street northerly to Market street, and then down Market street to Van Ness avenue" (Tr., page 286).

Relative to plans for using Twin Peaks Tunnel, the same witness testified as follows:

"It is the hope to give to the people who pay the assessment and put up their money to get service, a rapid transit electric street railway service through the tunnel as soon as it is completed. It is proposed that the cars after coming out of the easterly portal of Twin Peaks Tunnel shall go down Market street. That is the only way at present of getting to the center of the city with the present amount of traffic. Of course, when business expands and a large population exists out in this section of the country, possibly 150,000, then cars cannot be taken on the surface down Market street, but they will have to be taken either depressed or elevated, but at present such a construction would not be justifiable. In my opinion, the present surface road on Market street is the only relief these people can get in the way of service.
* * *

"With reference to the demands that were made by residents of this portion of the city for the construction of the tunnel and the improvement in street car service, I know that they have been very insistent with the Supervisors and municipal administration, and that they were absolutely compelled to proceed with this project and give the city the service and opportunity for development and growth which it needs" (Tr., pages 287, 289).

A. S. Baldwin, a witness for the defendants, testified relative to the street railway service from the new tracts laid out on the section shown on the map as Rancho San Miguel as follows:

"With reference to the street railway service in the portion of the city which I have just been discussing, I think that considering the route that the roads have

to take to get there, it may be fairly adequate, but the service, as I understand it, is a 12 to 15 minute headway. The routes that the road must take, with hardly any exception, are so indirect that they result in not giving the proper service. In other words, there is no inducement hardly to anybody to go out there to live except with the expectation of obtaining more direct and better service in the future. That expectation is the hope of service through the Twin Peaks Tunnel, now in course of construction, and which is to be finished by next year" (Tr., page 279).

Again, on page 280:

"I think that the lack of development of the portion of the city west of Twin Peaks is due to lack of adequate transportation, and except for our belief in that, we certainly would not have invested as heavily as we have to build the tunnel. The tunnel is being built entirely by the property owners and the people who own property west of the west portal are contributing over three million dollars towards its construction. In my opinion, the Twin Peaks Tunnel is the solution of the traffic condition there. The tunnel will be 11,800 feet long and will cost about four million dollars. The interests which I represent and myself are relying and hoping for a trolley line, through the tunnel, that will take us down through the heart of the city, to the ferry. The natural way from the mouth of the tunnel to the heart of the city, if it is a surface line, is Market street. I can see no alternative" (Tr., page 280).

C. C. Young, a witness for the city, testifying relative to St. Francis Wood, said:

"From my contact with prospective buyers and my efforts in making sales, I know that it is practically impossible to make sales now with the present car service, owing to the length of time it takes to reach the property. If the time were cut in two, I would expect the tract to fill up at once. I have had that objection made by prospective purchasers hundreds of times. We will have between six hundred and

seven hundred lots in the tract. We would hope to see practically all of it sold—a large portion of it built on within the next four or five years if adequate service were had. The idea we have always had is to get that service through Twin Peaks Tunnel" (Tr., page 283).

The building of the outer tracks on Market street was planned for the double purpose of furnishing much needed transportation for rapidly growing residence districts and to relieve congestion on the already overcrowded lines of complainant's road on the street. This lack of necessary transportation lines and the extreme congestion on the Market street line of the company is vividly presented in the communication from the United Railroads of San Francisco to the Board of Supervisors, set out in full at pages 311 to 315 of transcript of record. The communication was sent to the board in response to certain inquiries made of the company by the Board of Supervisors, contained in Journal Resolution No. 1600, Tr., pages 315-317. In part the communication from the company is as follows:

United Railroads of San Francisco,

58 Sutter Street,

President's Office.

SAN FRANCISCO, January 11, 1915.

To the Honorable the Board of Supervisors of the City and County of San Francisco.

DEAR SIRS: In acknowledging receipt of the resolution adopted by your honorable board last week, we beg to answer the questions contained in that resolution as follows:

First.

The present policy of the United Railroads in the matter of the extension of existing lines would be to meet the conditions of the growth of the city, were

such a policy practicable. But unfortunately, by reason of the restrictions contained in the charter, it is impossible for any private corporation to finance the construction of any street railroads in any part of the city. These charter conditions may be briefly referred to as follows:

a. Minimum wage scale, $3.00 for eight hours, with time and a half for overtime.

b. Reversion of all physical property to the city at the end of the franchise period, which is limited to twenty-five years.

When to this condition is added the heavy tax burden, it makes an impossible financial proposition.

Second.

The answer to this question is largely covered by the answer to the first. It should be stated, however, that wherever the company is operating existing lines it is prepared to add additional rolling stock as the traffic demands.

It cannot be denied that during the so-called "rush hours" the cars are overcrowded, but it is not true that by simply increasing the number of cars this condition can be ameliorated. On those lines to which this criticism is particularly directed, the addition of cars would only tend to make a bad matter worse by reason of the fact that the capacity of the tracks in the down-town section, where the overcrowding is greatest, has already been reached, and adding cars would tend to decrease the schedule speed so much that the number of persons which we could carry by a given point within a given time would also be decreased.

This condition of overcrowding will be found in practically every city having a population exceeding 100,000. It is a problem confronting every street railroad operator, and no question in connection with city transportation has been given more careful study.

In New York City, for instance, the transportation problem prior to the construction of the subways was the most serious matter confronting the municipality. It was thought that when the subways were com-

pleted the problem would be solved, but, although they have been in operation for several years, the present conditions are fully as bad as they were prior to their construction, and during the rush hours the overcrowding of the subways, surface lines and elevated railroads are far in excess of anything San Francisco has ever experienced.

Extending the lines of this company into the outlying districts or the reconstruction of any roadbed will in no way solve the problem of the rush-hour congestion.

* * * * * * *

Finally, we beg leave to say that the public is entitled to adequate transportation facilities, and, to the extent that private capital cannot or will not build the necessary extension, it is not alone the right but the duty of the city to furnish same, and we would not, if we could, do anything to obstruct the fulfillment of that duty.

Trusting in this way to have furnished your honorable board with the desired information, we beg leave to remain,

Yours very respectfully,

UNITED RAILROADS OF SAN FRANCISCO,

By JESS W. LILIENTHAL,

President.

J. W. L./A. C.

Points and Authorities.

I.

Grants of special privileges are always construed strictly in favor of the public. "Whatever is not unequivocally granted is withheld; nothing passes by mere implication." Knoxville Water Co. *vs.* Knoxville, 200 U. S., 22-34; 50 L. Ed., 353-359; Madera Water Works *vs.* Madera, 228 U. S., 454; 57 L. Ed., 915; Tillamook Water Co. *vs.* Tillamook, 139 Fed., 406; Tillamook Water Co. *vs.* Tillamook, 150 Fed., 119; Blair *vs.* Chicago, 201 U. S., 400-472; 50 L. Ed., 801-831; Boise City *vs.* Boise Water Co., 186 Fed., 705; Central

Trust Co. *vs.* Municipal Traction Co., 169 Fed., 308; Cleveland Electric Ry. Co. *vs.* Cleveland, 204 U. S., 130; 51 L. Ed., 405; Curtis *vs.* Whitney, 13 Wall., 68; 20 L. Ed., 513; Stein *vs.* Bienville Water Supply Co., 141 U. S., 67; 35 L. Ed., 622; Long Island Water Supply Co. *vs.* Brooklyn, 166 U. S., 685; 41 L. Ed., 1165; Joplin *vs.* Southwest Missouri Light Company, 191 U. S., 150; 48 L. Ed., 127; Freeport Water Co. *vs.* Freeport, 180 U. S., 587; 45 L. Ed., 679; Danville Water Co. *vs.* Danville, 180 U. S., 619; 45 L. Ed., 697; Rogers Park Water Co. *vs.* Fergus, 180 U. S., 624; 45 L. Ed., 702; Covington & Lexington Turnpike Road Co. *vs.* Sanford, 164 U. S., 578; 41 L. Ed., 560; Water, Light & Gas Co. *vs.* Hutchinson, 207 U. S., 393; 52 L. Ed., 257; Detroit Citizens' Street R. Co. *vs.* Detroit R. R., 171 U. S., 48; 43 L. Ed., 67.

II.

The City and County of San Francisco had no power to grant an exclusive railway franchise.

The fountain of power in the matter of granting franchises conferring special privileges of the kind under consideration in this case is in the State itself. This power may be delegated to municipalities, but the scope of their authority is always limited by the extent of the power granted. A city has no power to grant exclusive franchises unless specifically authorized to do so by the legislature of the State. Detroit Citizens Street R. Co. *vs.* Detroit Rwy., 171 U. S., 48, 43 Law Ed., 67; Owensboro *vs.* Cumberland Tel., Etc., 230 U. S., 58; Wright *vs.* Nagle, 101 U. S., 791; Jackson County Horse Rd. Co. *vs.* Interstate Rapid Transfer Ry. Co., 24 Fed., 306; Home Tel. and Tel. Co. *vs.* Los Angeles, 211 U. S., 264, 53 Law Ed., 176; Dillon Mun. Corp., 5 Ed., Sections 1215, 1218, 1234.

III.

Municipal competition, unless the municipality is expressly excluded from such competition, does not impair

the obligations of a contract arising out of a franchise to a public service corporation, though the holder of such franchise is protected against competition from other public service corporations.

Knoxville Water Co. *vs.* Knoxville, 200 U. S. 22, 50 L. Ed., 335; Madera Water Works *vs.* Madera, 228 U. S., 454; same case in District Court, 185 Fed., 281; Hamilton Gas Light Co. *vs.* Hamilton, 146 U. S., 268; 36 L. Ed., 963; Helena Water Works *vs.* Helena, 195 U. S., 383, 49 L. Ed., 245; Joplin *vs.* Light Co., 191 U. S., 150, 48 L. Ed., 127; Skaneateles Water Co. *vs.* Skaneateles, 184 U. S., 354, 46 L. Ed., 585; Bienville Water Co. *vs.* Mobile, 175 U. S., 109; 44 L. Ed., 93; Long Island Water Co. *vs.* Brooklyn, 166 U. S., 685, 41 L. Ed., 1165; Tillamook Water Co. *vs.* Tillamook, 150 Fed., 119; Lehigh Water Co. *vs.* Easton, 121 U. S., 388, 30 L. Ed., 1059; Seattle Electric Co. *vs.* Seattle, etc., R. R. Co., 185 Fed., 371; Puget Sound Traction Co. *vs.* Tacoma, 217 Fed., 265; Washington-Oregon Corp. *vs.* Chehalis, 202 Fed., 591; Clark *vs.* City of Los Angeles, 160 Cal., 30; Glenwood Springs *vs.* Glenwood L. & W. Co., 202 Fed., 678, L. R. A. (1915 C) 438 and note; Mayor, etc., *vs.* Farmers' L. & T. Co., 143 Fed., 71; San Francisco *vs.* McGovern, 28 Cal. App., 511.

IV.

Section 499 of the Civil Code limits the power to *grant* franchises conferred upon municipalities by Sec. 497. The power to *grant* franchises may be further limited or enlarged at the will of the legislature to meet the changing needs of the city's growth and development. Williams *vs.* Wingo, 177 U. S., 601.

V.

Section 499 is a regulatory statute enacted in the interest of the public generally and was not intended to con-

fer exclusive privileges upon grantees of street railway franchises.

> "The main purpose of the section is to protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two railways under different managements were permitted to use the same street for more than five blocks." San Jose-Los Gatos Interurban Ry. Co. *vs.* San Jose Ry. Co., 156 Fed., 455.

VI.

It is elementary that the power of the State to amend laws regulatory in their purpose is not exhausted because once exercised.

VII.

The police power of the State may be exercised in the interest of public welfare and convenience as well as in the interest of public health, morals and safety.

Noble State Bank *vs.* Haskell, 219 U. S., 110, 58 L. Ed., 116; Camfield *vs.* U. S., 167 U. S., 524, 42 L. Ed., 262; German Alliance Ins. Co. *vs.* Lewis, 233 U. S., 389, 58 L. Ed., 1011; Rail & River Coal Co. *vs.* Yaple, 214 Fed., 273; Manigault *vs.* Springs, 199 U. S., 473; Chicago, Burlington and Quincy Ry. Co. *vs.* Nebraska, 170 U. S., page 57.

VIII.

Section 497 conferred power upon the municipality to grant franchises, but not exclusive franchises. Section 499 is not a grant of any further power to municipalities and it does not by its terms confer any franchise. Therefore, it cannot be said that by the provisions of this section a different kind of a franchise is granted to complainant than authorized by the provisions of section 497.

A municipality does not grant to itself the right, or confer a franchise upon itself, to operate a public utility. The operation of a public utility by a municipality is not the

exercise of a franchise. The term "railroad corporations" as used in section 499 does not embrace a municipality operating a municipally owned railroad.

IX.

The use of a street for street railway purposes is uniformly held to be an ordinary use of the street. If a first railway franchise granted was not exclusive, a second franchise granted for the same purpose is legitimate and imposes no different character of burden on the street, even though it may cause some inconvenience to others entitled also to use the street. All traffic upon the streets must submit to the inconveniences which necessarily flow from multiplied legitimate traffic.

X.

It is the general rule of law that lines of one street railway may cross the lines of another without compensation first paid.

Consolidated Traction vs. South Orange, etc., Co., 56 *New Jersey Eq.*, 569; *Nelles on Street Railways, vol.* 1, *sec.* 108; *Am. and Eng. Ency.*, 2*d vol.*, 27, *page* 24; *Lewis on Eminent Domain, vol.* 2 (3d ed.), *sec.* 424.

XI.

Section 500 of the Civil Code incorporates only such part of section 469 of title 3 as relates to the manner of crossing, viz:

> "The rails of either of such roads must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible."

Section 510 of the same Code does not incorporate section 469 into title 4 of that Code.

XII.

The determination of the necessity for added transportation facilities on Market street rested with the proper municipal officers of the City and County of San Francisco, and is not a matter for review by the court.

XIII.

The complainant's franchise, not being exclusive, was taken subject to the right of the municipality to grant a second franchise, or the exercise by the municipality of similar rights without the necessity of a grant. The reasonable and necessary incidents flowing from the exercise of such second right were assumed by the grantee of the first non-exclusive franchise to the same extent as though the contract or ordinance granting the first franchise contained a specific recital that the grantee accepted the franchise subject to all the reasonable and necessary incidents flowing from the operation of the second street railway line. Therefore, the complainant cannot maintain its claim that its property right is damaged by the proper operation of a second road.

XIV.

The provisions of the San Francisco Charter as to solicitation of offers have been complied with.

A similar contention to the one made by complainant here was decided adversely in

Platt *vs.* City & County of San Francisco, 158 Cal., 74.

ARGUMENT.

It was necessary for counsel for respondents to commence the preparation of this brief before the receipt of copies of appellant's brief. We shall assume that counsel for appellant rely upon the same points urged before the trial court.

There are two important principles, enunciated by numerous decisions of the courts of this country, which are of controlling importance throughout the consideration of every aspect of this case, viz:

First. Grants of special privileges are construed strictly in favor of the public. "Whatever is not unequivocally granted is withheld; nothing passes by implication."

Second. The fountain of power, in the granting of franchises such as we are concerned with in this case, is in the State, and a municipality cannot grant any franchises other than such as the legislature has specifically authorized the municipality to grant. A city cannot grant an exclusive franchise unless the State has given such city power to grant exclusive franchises.

The State vested the city with authority to grant street railway franchises generally, subject, however, to the limitations contained in section 499 of the Civil Code. No authority was given the city to grant exclusive franchises. The State could have vested the city with power to grant exclusive franchises, or might have given power to grant such franchises generally without any limitation such as is contained in section 499, or the State might have added other limitations. The State did not exhaust its power relative to vesting the city with authority in the matter of granting such franchises at the time of the enactment of sections 497 and 499.

Any limitations or restrictions imposed upon the city may be removed at any time and further power given in the matter of granting franchises.

The franchise was accepted by the company subject to the imposition of further terms, conditions, and restrictions to meet the future traffic conditions. Section 2 of complainant's franchise reads as follows:

> "Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by

said company, upon such terms, conditions and restrictions as are now imposed, *or may hereafter be imposed*, by the laws of the State of California, and especially the terms, conditions, and restrictions imposed by the 498th and 500th and 502d sections of the Civil Code of the State of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said State, and a strict compliance on the part of said company with all of the provisions of said laws is hereby required."

The City is Not Precluded from Operating Its Own Street Railways Because of the Terms of Section 5 of Complainant's Franchise.

Section 5 reads as follows:

> "Section 5. It shall be lawful for the Board of Supervisors of the City and County of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this State. This section shall apply *to persons and companies, as well as corporations.*"

The city requires no grant of a franchise in order to enable it to construct and operate a municipal railway system. The sovereign power of the State, so far as the regulation and control of the use of the streets for any and every purpose, is now vested in the city. (Charter of San Francisco, Article II, Chapter I, Section I, Paragraph 2, pertaining to "Powers of the Supervisors.")

> "Except as otherwise provided in this Charter, or in the Constitution of the State of California, to regulate and control for any and every purpose the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the City and County."

Section 19 of Article XI of the Constitution of California was amended October 10, 1911, and now, in part, reads as follows:

> "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water power, heat, transportation, telephone service, or other means of communication. Such works may be acquired by original construction or by the purchase of existing works including their franchises or both."

Neither the Words "Railroad Corporations" nor the Words "Persons and Companies as Well as Corporations" as Used in Section 499 of the Civil Code or in Section 5 of the Franchise Include Municipalities Within Their Terms.

The proposition stated above has been definitely decided by the Supreme Court and other Federal courts in the cases cited in our points and authorities, *supra*, from which quotations are here inserted.

Knoxville Water Co. *vs.* Knoxville, 200 U. S., 22; 50 L. Ed., 356.

In the above case the city granted a franchise to a water company providing:

> "In consideration of the promises and undertakings by the water company, as set out in the above agreement, the city covenanted and agreed, among other things, 'not to grant to any other person or corporation, any contract or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, A. D. 1883, provided the company comply with the requirements and obligations imposed and

assumed by them under and by virtue of this agreement';"

The court say:

"The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1, 1883, grant to any person or corporation the same privileges it had given to the water company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own. For some reason, not distinctly disclosed by the record, the city abandoned the scheme it had at one time formed, of constructing its own system of waterworks. And it may be that it did not, in 1882, intend or expect ever again to think favorably of such a scheme. It may also be that the water company, having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition, if the city would agree not to give to other persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, as if purposely, not to bind itself further. The agreement, as executed, is entirely consistent with the idea that while the city, at the time of making the agreement of 1882, had no purpose or plan to establish and operate its own waterworks in competition with those of the water company, it refrained from binding itself not to do so, although willing to stipulate, as it did stipulate, that the grant to the water company should be exclusive as against all other persons or corporations. We are therefore constrained by the words of the agreement to hold that the city did not assume, by any contract protected by the Constitution of the United States, to restrict its right to have a system of waterworks, independent altogether of the system established and maintained by the water company. If this interpretation of the contract will bring hardship and loss to the water company, and to those having an interest in its property and bonds, the result (omitting now any consideration of the ques-

tion of power) is due to the absence from the agreement between the parties of any stipulation binding the city not to do what, unless restrained, it now proposes to do.

"While there is no case precisely like the present one in all its facts, the adjudged cases lead to no other conclusion than the one just indicated. We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which, under previous authority, had placed its pipes, mains, etc., in public streets to supply, and was supplying gas for a city and its inhabitants: 'It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently it contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works, for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis vs. Whitney*, 13 Wall., 68, 70; 20 L. Ed., 513, 514: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and national legislation." If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

Hamilton Gaslight & Coke Co. vs. Hamilton, 146 U. S., 258, 268; 36 L. Ed., 963, 968; 13 Sup. Ct. Rep., 90; *Skaneateles Waterworks Co. vs. Skaneateles*, 184 U. S., 354, 363; 46 L. Ed., 585, 590; 22 Sup. Ct. Rept., 400.

* * * * * * *

> "It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its power.
>
> "As, then, the City of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case."

Lehigh Water Co. vs. Easton, 121 U. S., 388-390; 30 L. Ed., 1059-1060:

The Lehigh Water Company for many years prior to June 21, 1880, maintained a system of waterworks in the borough of Easton. On that day it accepted the provisions of an act of the General Assembly of Pennsylvania approved April 20, 1974, entitled "An act to provide for the incorporation and regulation of certain corporations." By such acceptance it became entitled to the benefit of the third clause of the 34th section of that act relating to water and gas companies. That clause provides in part:

> "The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders during five years, a dividend equal to eight per centum per annum upon its capital stock;"

After the acceptance by the Lehigh Water Company of the provisions of the act referred to, the constituted authorities of the borough of Easton, in conformity with a vote of its qualified electors, and under power conferred by acts of the General Assembly approved March 12, 1869, and April 15,

1867, determined to construct and itself maintain a system of public works for supplying its inhabitants with water. The court held that the act of 1874 did not repeal the act of 1867, and that the exclusive nature of the franchise as applied to other private corporations does not extend to the municipality. Upon this point the court says (p. 1060):

> "The third ground of objection is wholly without merit. By constructing water works of its own the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded itself from such new grant the incidental injury can constitute no obstacle. *Charles River vs. Warren Bridge,* 36 U. S., 11 Pet. 420 (9:773); *Turnpike Co. vs. Maryland,* 70 U. S., 3 Wall, 210 (18:180); *Piscataqua Bridge vs. New Hampshire Bridge,* 7 N. H. 35. No contract has been shown between the water company and the State by which the latter is precluded from granting to the borough of Easton the privilege of erecting works to supply its citizens with water."

Washington-Oregon Corp. et al vs. City of Chehalis et al., 202 Fed., 591:

The city of Chehalis granted a franchise to a water company, in which it was particularly provided that the franchise should continue in force for a period of thirty years, "during which time the city of Chehalis agrees not to contract with any other person or persons, corporation or corporations, for a supply of water."

It was held that this language did not prevent the city from constructing a water system of its own during the thirty years' term of its franchise.

The cases on both sides of the question on the exclusiveness of a franchise of this character as against municipal

competition are cited on pages 594-595. After such citation the opinion continues:

> "As in any other contract, the language of the franchise must be looked to for the intention of the parties. In the Walla Walla case, the franchise was for 25 years, and provided that, until it was avoided by the court of competent jurisdiction, the city could not erect, maintain, or become interested in other water works. Held, in the absence of such a judgment, the city could not take steps to provide a water system of its own. In the Knoxville case, by the franchise, the city agreed 'not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville * * * for the full period of 30 years.' Held, that the city was not, in the absence of a special stipulation to that effect, precluded from establishing its own system of waterworks. In the Vicksburg case, the exclusive right and privilege was granted for a period of 30 years to erect, maintain, and operate a system of waterworks. Held, that the franchise precluded the city from erecting its own waterworks during the life of the franchise. While so holding, the Court reiterated that grants and franchises, are to be strictly construed in favor of the public, and that nothing is to be taken by implication. The Knoxville case is distinguished.
>
> "As shown above, in the case now under consideration, the language of the franchise, which it is contended is exclusive, is that:
>
> " 'The city of Chehalis * * * hereby agrees that this ordinance and franchise and the rights contained and granted thereby * * * shall continue in full force for a period of 30 years, * * * during which time the city of Chehalis agrees not to contract with any other person, or persons, corporation or corporattions, for a supply of water.'
>
> "In the light of the foregoing authorities, without citing others, the court holds that the City of Chehalis has not, by the franchise in question, precluded itself from erecting a water system."

Pudget Sound Traction, L. & P. Co. vs. City of Tacoma, 217 Fed. 265:

An ordinance granting a franchise to an electrical company provided that the city should have the right at any time to require the company to place its wires underground, but that it should not be required except on the same streets and to the same extent as the wires "of all other persons or corporations used to transmit electricity," were required to be placed underground.

Held, that the word "corporations" as used in said provision did not include the city, and the fact that the city itself maintained wires above ground did not invalidate an ordinance requiring the company to place its wires underground.

The decision is upon the ground that the city does not come within the designation of all other persons or corporations, thus following the Knoxville case. Upon this point, the court says:

> "Complainant's franchise provides that the city should have the right at any time to require it to place all or any portion of its wires in underground conduits, except the main transmission lines, from where the same enter the corporate limits from the generating plants to the main distributing stations, but that it should not be required to place the poles and wires underground except upon the same street or alley, or streets and alleys and to the same extent as the wires of all other persons or corporations used to transmit electricity for power and heat are required to be placed underground.
>
> "It is contended by complainant that the city is a corporation; that it has not, and does not intend to, put its heat and power wires underground; that to require complainant so to do is contrary to the foregoing provision of its franchise.
>
> "In view of the conclusion reached, that the underground ordinance does not apply to the purchased poles and wires, it is not necessary to decide this question; but, in view of the earnestness with which

it has been argued, it is deemed not improper to express the court's view.

"Throughout the ordinance granting complainant's franchise the city is always spoken of as 'the city' or the 'City of Tacoma.' This fact and the fact that, as ordinarily used and understood, the word 'corporation' does not include cities, while they are, in fact, municipal corporations, rendered it clear that the words 'persons or corporations' were not intended to include the city itself.

"In Knoxville Water Co. *vs.* Knoxville, 200 U. S. 22; 26 Sup. Ct., 224; 50 L. Ed., 353, by the franchise there in controversy the city agreed 'not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville * * * for the full period of 30 years.' It was held that the city was not, in the absence of special stipulations to that effect, precluded from establishing its own system of waterworks. The Knoxville case was followed by this court in Washington-Oregon Corporation *vs.* Chehalis (D. C.), 202 Fed., 591. The reasoning in the Knoxville case cannot be distinguished from that controlling in the present case."

Madera Water Works *vs.* Madera, 228 U. S., 454; 57 L. Ed., 915.

Tillamook Water Co. *vs.* Tillamook, 139 Fed., 406. Same case on appeal, 150 Fed., 119.

The opinions in the above cases last cited announce the rule here contended for, and are quoted from under another paragraph of this argument.

The City Was Not Vested with Power to Grant Exclusive Franchises, and Therefore Could Not Make the Grant Exclusive against Itself or against Persons, Companies, or Corporations.

Conceding for the moment, for the purpose of argument only, that the municipal corporation is included within the term "corporation" in that portion of section 5 reading as follows: "This section shall apply to persons and com-

panies, as well as corporations," we still contend that the city is not excluded from the operation of its municipal cars on any street in the city.

The authority for the municipality to grant street railway franchises is contained in section 497 of the Civil Code. It is by virtue of this section alone that the city was authorized by the legislature to grant to complainant the franchise in question.

Section 497 at the time the franchise was granted read as follows:

> "Section 497. Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years not exceeding fifty from the Trustees, Council or other body to whom is entrusted the government of the city or town under such restrictions and limitations and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks other than by horses or mules, unless for special reasons, as hereinafter provided."

Here is the city's authority to *grant* merely, with no power given it to make such grant exclusive.

It is a well-established principle of law, supported by innumerable decisions of the courts of this country, that a municipality has no power to grant exclusive franchises unless such power has been granted the municipality by the legislature. We will refer to only a few of the cases announcing this principle:

Detroit Citizens' Street R. Co. vs. Detroit Rwy., 171 U. S., 48; 43 Law Ed., 67:

In the case just cited the city had attempted to grant an exclusive franchise for the operation of street railways, and the question in the case was whether or not the city was prevented, because of the franchise formerly granted, from granting a similar franchise to another railway company.

The opinion was delivered by Mr. Justice McKenna, and, in part, reads, page 53:

> "That such power must be given in language explicit and expressed, or necessarily to be implied, from other powers, is now firmly fixed. There were many reasons which urged this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which without the clearest intention expressly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and reason for it are expressed in Mintuin *vs.* Larue, 64 U. S., 23; Wright *vs.* Nagle, 101 U. S., 791 (25: 921), and many other cases."

Again on page 55:

> "Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monoply. Consequently, those given in perpetuity and in monopoly must have for their authority exclusive permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensible."

In Vol. XII, R. C. L., page 188, the principle of law is stated as follows:

> "The power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensible to them. This principle is firmly fixed by authority" citing Water, etc., *vs.* Hutchinson, 207 U. S., 385; 52 Law Ed., 257; Owensboro *vs.* Cumberland Tel., etc., 230 U. S., 58, 69; 67 Law Ed., 1389; Wright *vs.* Nagle, 101 U. S.; Dillon Mun. Corp., 5th Ed., Secs. 1215, 1218, 1234.

The decision in the case of Jackson County Horse Rd. Co. *vs.* Interstate Rapid Transit Ry. Co., 24 Fed., 306, dis-

cusses the question of the power of a city to grant exclusive franchises very thoroughly.

In this case the city of Kansas had passed an ordinance granting to a railway company "the sole right for the space of twenty-one years [illegible] maintain, and operate their railway over [illegible] he streets in the city of Kansas." It was held [illegible] this ordinance as purported to give exclusive [illegible] as beyond the powers vested in the city of Kans[illegible] or that reason, void, and that the city could grant a franch[illegible] to another and competing company.

In the Home Tel. and Tel. Co. *vs.* Los Angeles, 211 U. S., 264; 53 Law Ed., 176, the court says:

> "The surrender by contract, or a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, *as well as the authority to make it* must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required. This proposition is sustained by the decisions in this court which will be referred to hereafter and we need not delay further upon this subject."

Judge Hunt, the learned trial judge in the court below, in speaking of the exclusiveness of the franchise in question, said (opinion of the court, Transcript, page 189):

> "This general rule is but another form of stating a principle that statutory grants by way of franchise or property, in which the Government or public has an interest are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.
>
> "It is very important to note that words of direct expression or intention to grant an exclusive franchise are not to be found in the instrument itself; nor

> does it appear that exclusiveness was a positive consideration for the contractual obligation. Nor is there any expression by apt words to show that the city intended to exclude itself from exercising the privilege of establishing a street railway of its own.

If the city had no power to grant an exclusive franchise directly, it could only accomplish the same result by refusing to make a similar grant to any other person or corporation. Such a refusal to grant a similar franchise to another street railway company might be a proper exercise of discretion by the board of supervisors, for section 497 states "Authority to lay railroad tracks * * * *may* be obtained for a term of years not exceeding fifty, etc." This would be the only way the municipality could maintain the exclusiveness of such a franchise already granted by it. This lack of authorization by the legislature to grant exclusive franchises for street railway purposes would render void any provision in such a franchise granted attempting to exclude either third parties or the municipality itself.

We do not interpret section 5 of the franchise as attempting to make the franchise exclusive even as against third parties. Section 499 provided at that time that "two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track." We think this portion of section 499 furnishes the explanation for the insertion of section 5 in the franchise. The clause quoted is permissive only, and when such permission has been granted, each of the corporations is to pay an equal portion for the construction of the track. As a guard against any possible interpretation that the franchise granted was exclusive, or exempted the grantee from permitting a second corporation to use its tracks upon the payment of an equal portion of the cost of constructing such tracks, this provision of the law was incorporated in the way it is set out in section 5.

> "It shall be *lawful* for the Board of Supervisors of the City and County of San Francisco to grant to one

other corporation and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this State. This section shall apply to persons and companies as well as corporations."

This is a mere declaration that the city did not waive its right to grant to a second corporation the use of the streets for similar purposes to the extent and subject to the conditions set out in section 499. It is not the grant of any additional right to the company. The city could not exceed the power conferred upon it by the legislature in the matter of granting franchises. Section 5 of the franchise dealing with the same subject matter contained in section 499 of the Civil Code could not confer any right not authorized by section 499.

The City is Not Excluded from the Use of the Streets for Railway Purposes by Section 499 of the Civil Code.

Section 499 is found in the chapter dealing with street railroad corporations.

Section 497 of that chapter is the section of the Code conferring upon municipalities the right to authorize railroad tracks to be laid upon the public streets and highways of any incorporated city or town. Section 499 is a regulatory statute containing a limitation upon this power in the interest of the public use of the streets, and providing the manner in which two railway corporations may be permitted to use the same street or tracks. When complainant's franchise was granted the section read:

"Section 499. Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case *must* two railroad corporations occupy and use the same track for a distance of more than five blocks."

It is clear the legislature, in enacting the section as above quoted, had in mind the regulation of the streets in the interest of the public and did not have in mind any purpose of granting exclusive rights to one or more corporations in the interests of such corporations. The question of the inconvenience to the public which might arise if two railway corporations used the same street or tracks for a distance of more than five blocks was undoubtedly the predominating thought in the minds of the legislators. Inconvenience to the public might arise from obstructing the use of the street for other forms of traffic. They might have considered, having in mind the then existing forms of vehicular traffic, that inconvenience to other forms of street traffic would outweigh any benefits flowing from added street railway lines.

The legislature then considered it best to provide that two corporations might be permitted to use the same street or track for a distance of not more than five blocks, and made provision that in doing so each corporation should pay an equal portion for the construction of the track jointly used.

The latter clause of the section, as it stood at the time complainant's franchise was granted, prohibited two railroad companies from using the same street or track for a distance of more than five blocks in any event. Two corporations could not then jointly use the same street for a distance of more than five blocks even by agreement.

On March 21, 1907, section 499, was amended in part to read as follows:

> "Two or more lines of street railway operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such lease or contract upon payment of an equal portion for the construction of the tracks and appurtenances used by such railways jointly."

In 1911 the section was again amended in part as follows:

> "Provided, that any incorporated city, city and county or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits *for any number of blocks* upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway."

The amendments to the section reflect the changing views of the legislature relative to the regulation of street railway traffic in the interest of the public. Improvements in street railway construction, in the motive power used for propelling the cars, changes in the type and character of vehicular traffic, the rapid growth of large cities and the necessity of furnishing more adequate transportation, and many other considerations all tending toward the public interest moved the legislature in amending the section as set out above. At no period of this legislation does it appear that the legislature had in mind the granting of exclusive rights to any particular corporation engaged in street railway business.

Further light is thrown on the purpose of the legislature in adding the second clause of section 499 by the amendments to the corresponding statute made March 28, 1870 (Statutes 1869-70, p. 481) and March 23, 1872 (Statutes 1871-2, p. 515). After the amendment of March 28, 1870, the last clause read:

> "but no such *grant* shall be made for more than five blocks in all."

After the amendment of March 23, 1872, this clause read:

> "but no such joint *grant* shall be made *in the city and county of San Francisco* for more than two blocks in all."

What was the purpose of this amendment? Can it be said it was for the purpose of making street railway franchises relatively more valuable in San Francisco than in any other city of the State of California? It would be vicious legislation if this interpretation could be placed on the amendment of March 23, 1872. Such was not its purpose. The purpose was a further exercise of the police power of the State in the interest of the public of San Francisco generally to meet conditions as the members of the legislature then saw them to exist in this city. San Francisco was the largest city in the State. Market street, particularly, was the one great artery for traffic in the city. The legislature may well then have considered that the proper use of the street in the interests of all of the people, considering all forms of traffic, would best be subserved by a further limitation of the power of the board of supervisors to grant a joint use of the street or track for a distance of more than two blocks.

If this section was intended as a regulatory statute in the interest of the public convenience, it was at all times subject to amendment to best conserve public convenience. It was an exercise of the police power of the State.

The Circuit Court of the United States for the Northern District of California, in the case of San Jose-Los Gatos Interurban Ry. Co. *vs.* San Jose Ry. Co., reported in 156 Fed. Rep., p. 455, had before it a case involving the interpretation of section 499 of the Civil Code. Relative to the meaning of the section the court say (p. 458):

> "The main purpose of the section is to protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two railways under different managements were permitted to use the same street for a distance of more than five consecutive blocks, and, as the city or town is authorized to grant to two independent railways the right to use the same street to the extent named,

provision is made for an equitable distribution of the cost of constructing such tracks and appurtenances, as are used by them jointly."

The construction placed upon the section in the case just cited is entirely reasonable. If that construction be correct, then the section could undoubtedly be amended by the legislature at any time in order to make the provisions of the section best comply with changing conditions of municipal needs and convenience.

Judge Hunt placed the proper interpretation upon the language of section 499, when he said (opinion of the court, transcript, p. 190):

> "* * * I believe that the section should be read as a whole and is not to be separated into two wholly independent provisions whereby the one is to be read as appertaining only to permission and the other as solely writing a prohibition to be regarded as a general law of the State binding upon municipal or other corporations, and not open to repeal or modification as affecting the franchise of complainant. The interpretation I put upon the last clause of section 499 is that in no case must two railroad corporations, granted permission under the section, occupy and use the same street or track for a distance of more than five blocks. Permission is indispensable. There may be permission for joint use but such use shall not be authorized for more than five blocks. That this was the construction put upon the provision by those directly interested at the time of the grant of the franchise is a fair inference when we consider the language of section 5 of the franchise, which provides in effect, that the supervisors may grant to one other corporation and no more, the right to use either of the streets described in the franchise, for a distance of five blocks and no more 'upon the terms and conditions specified in the 499th section of the Civil Code of this State.'"

Police Power of the State May Be Exercised in the Interest of Public Welfare, Convenience, and Necessity, as Well as in the Interest of Public Health, Morals, and Safety.

Complainant argued before the trial court that the police power of the State is properly limited to matters affecting the public health, morals and safety. This argument overlooks the fact that the police power may be exercised for the protection or promotion of the public welfare and convenience as well as for matters which come strictly within the category of health, morals, and safety. Decisions can undoubtedly be found in which the discussion as to the application of this power is limited, as claimed by complainant in the court below, but it cannot be successfully denied that recent decisions have extended this beneficent power to include the promotion of the public interest and convenience in many matters not strictly of health, morals, and safety.

Decisions of State courts might be cited almost without limit in which the judges of those courts have used very broad language showing the comprehensiveness of this power.

We content ourselves, however, with reference to a few of the recent decisions of the United States Supreme Court upon this question as follows:

Noble State Bank vs. Haskell, 219 U. S., 110; 55 L. Ed., 116:

In the above case the court upheld the validity of an act of the legislature of the State of Oklahoma providing for the collection of an assessment upon the average daily deposits of all banks within the State for the purpose of creating a depositor's guarantee fund out of which depositors in failing banks should be paid the amount of their deposits. With reference to such a law, the court say:

> "In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which

it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read the latter *a nolumus mutare* as against the lawmaking power."

* * * * * * *

"'*It may be said in a general way that the police power extends to all the great public needs.' Camfield vs. United States,* 167 U. S., 518; 42 L. Ed., 260; 17 Supt. Ct. Rep., 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In the case of Camfield *vs.* U. S., 167 U. S., 524; 42 L. Ed., 262, referred to in the Noble Bank case, the court say:

"The case is authority for the proposition that the police power is not subject to any definite limitations but is *coextensive with the necessities of the case and the safeguard of the public interest.*"

German Alliance Insurance Company vs. Lewis, 233 U. S., 389; 58 L. Ed., 1011:

In this case the court upheld the validity of an act of the State of Kansas regulating rates to be charged for fire insurance premiums upon the ground that the fire insurance business was so far affected with a public interest as to permit legislative regulation of its rates and charges.

Upon the question of the extent of the police power the court say (233 U. S., pp. 413-414; 58 L. Ed., 1022):

"Complainant feels the necessity of accounting for the regulatory State legislation and refers it to the

> exertion of the police power; but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to 'pass laws whose purpose is the health, safety, morals, and the general welfare of the people.' The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited. 'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.' *Chicago, B. & Q. R. Co. vs. McQuire*, 219 U. S., 540, 569; 55 L. Ed., 328, 339; 31 Sup. Ct. Rep., 259."

Reference might also be made to the recent case of Rail and River Coal Company *vs.* Yaple, 214 Fed., 273.

The decision in this case was rendered by three judges sitting in bank in the District Court of the Northern District of Ohio, and upholds an act of the State of Ohio, regulating the relations between employers and employees, and seeking to remove the causes giving rise to disputes between labor and capital. The decision (p. 280) contains a lengthy citation of cases in which the police power has been extended to matters of like character.

> "The powers by which the health, good order, peace, and general welfare of the community are promoted." Webber *vs.* Virginia, 103 U. S., 344; 26 Law Ed., 565.
>
> "One of the powers never surrendered by, and therefore remaining with, the State is to so regulate the relative rights and duties of all within its juris-

diction as to guard the public morals, safety, and health, as well as to promote the public convenience and the common good." House *vs.* Mayes, etc., 219 U. S., 270.

"While the police power has been most frequently exercised with respect to matters which concern the public health, safety, and morals, we have frequently held that corporations engaged in the public service are subject to legislative control so far as it becomes necessary for the protection of the public interest." *Louisville and Nashville Rd. vs. Kentucky*, 161 U. S., 695.

The exercise of the police power of the State may properly be exercised where it affects existing contracts, if public interest requires such exercise. This right was confirmed in the following cases:

Manigault vs. Springs, 199 U. S., p. 473; *Chicago, Burlington and Quincy Railroad Co. vs. Nebraska (in relation) Omaha*, 170 U. S., p. 57:

In Manigault *vs.* Springs, *supra*, complainant, and the two defendants had entered into a contract for the removal of a dam constructed across Kinloch Creek after the expiration of a certain period of time. In accordance with this agreement the obstruction was removed. Several years afterward the general assembly of the State passed an act reciting the necessity of draining the lowlands on the Santee River, whereby their taxable value would be greatly enhanced. Authority was given the *defendants by name* to erect and maintain a dam across Kinloch Creek. Plaintiff contended the statute impaired the contract; that it was not a valid exercise of the police power; that the statute was not a measure intended for the public *safety, health* or *morals*. The court held, in part, as follows:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common

> weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be effected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

Again, on page 481:

> "It only remains to consider, in connection with this branch of the case, whether the act of the General Assembly of 1903 was a proper exercise of the police power of the State. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the *health, lives,* and *morals* of the community, it is defensible in its broader meaning of providing for the general welfare of the people, by the reclamation of swampy, overflowed, and infertile lands, and the erection of dams, levees, and dikes for that purpose."

In Chicago, Burlington and Pacific Railroad Company *vs.* Nebraska (*supra*) it appears that the city of Omaha had entered into a contract with the Union Pacific Railway Company, the lessor of the defendant company, providing for the construction of a viaduct on Eleventh street across the tracks of this company, and in this agreement it was provided that the companies should pay three-fifths of the original cost of construction and of the damages to abutting property owners, and the city to provide for the payment of the remaining two-fifths of such cost and damages. A short time before the viaduct was opened for public use, the legislature of the State of Nebraska enacted a statute providing that cities of the class of Omaha should have power to require railroad companies operating tracks upon or across a public street, "to erect, construct, reconstruct, complete and keep in repair, any viaduct or viaducts upon or

along such street or streets and over or under such track or tracks, etc."

Several years thereafter the council of the city of Omaha passed an ordinance directing and requiring the railroad company to repair the Eleventh street viaduct in accordance with the plans and specifications prepared by the city engineer.

The case came to the Supreme Court on a writ of error. The railroad company claimed that it had entered into a contract with the city, under which the viaduct was built, at the joint expense of the railroad companies and the city; and that the enforcement of the ordinance in question would violate the terms of this contract, contrary to the provisions of the Constitution of the United States.

Mr. Justice Shiras delivered the opinion of the court. In part it is as follows:

> "No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continue to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be effected or controlled by subsequent legislation?"
>
> "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matter and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply."

Under the rules established by the cases above referred to, and many others which might be cited, it is apparent that the whole question of the regulation of traffic upon the streets of San Francisco is a matter for legislative and not judicial control. Complainant contended in the court below that it cannot be claimed that municipal action looking to the increase of street cars on an already badly congested street, with the necessary effect of increased danger to travelers, is designed in the interest of public health, morals, or safety. The reply to that suggestion is that such increase of street cars is designed in the interest of public convenience and welfare and that the determination by proper legislative authority of such convenience and welfare is not subject to review by the courts.

The evidence in this record shows the necessity for the proposed action by the city with reference to increased traffic upon Market street, but even in the absence of such evidence, the court could not substitute its judgment for that of the legislative officers of the city as to such necessity, or lack of necessity. The facts which appear from the evidence are that the growth of the city is being retarded by lack of sufficient street railway transportation facilities; that in order to remedy this condition, the city is expending nearly $4,000,000.00 in the construction of a tunnel, and that further street car facilities upon Market street are essential for the proper use of such tunnel. It must be assumed that the legislative officers of the city have balanced against whatever inconvenience may be caused by an increased number of cars upon Market street, the benefits which will be derived from the operation of such cars, and, in the exercise of the discretion committed to the board of supervisors, that body has determined that the welfare and convenience of the city demand this improvement. Under no theory of limitations of police power can it be successfully claimed that the board of supervisors has so exceeded its legal authority in this matter as to authorize a court to set aside its judgment.

Complainant's Rights, if any, under Section 499 of the Civil Code are Measured by the Present Form of that Section and Not By Its Terms as They Existed in 1879 When Complainant's Franchise Was Granted.

The reliance of complainant upon the original form of this section, as constituting a part of its franchise contract, overlooks the well-established doctrine that it is not all laws existing at the time of the grant of a franchise or other contract which enter into and form a part of such contract, but only those which affect the rights and obligations of the contracting parties.

Matters of municipal regulation do not fall within this category. The rule is clearly announced in a New York case, in which a depositor in a bank unsuccessfully sought to maintain the position that laws regulating the conduct of banks, which were in existence at the time he made his deposit, constituted a part of his contract with the bank.

Greenspar vs. Oliver, 149 N. Y., Supp., 752:

> "It is true that the State may, if it will, within the limits prescribed by its organic law, enter into private contracts with its citizens by which the people and the Government are forever bound; but we are never to construe a general statute as embracing such a purpose, when it is obvious that it was designed only as an expression of the legislative will for the time being, in a matter of mere municipal regulation. When this is the object of the law, those who act upon the faith of its provisions do so with a reasonable assurance, indeed, that it will not be modified or repealed until such action shall be required, in the judgment of the legislature, by the general interests of the community; but with notice that it is subject to revocation by the State whenever the public exigencies may demand. Such a repeal involves no breach of obligation in the sense of the Federal Constitution; for the faith reposed is on the stability of a general law, and not on the efficacy of a legal con-

tract. *People vs. Roper Commissioners of Taxes*, 47 N. Y., 501, 503; *Rector, etc., of Christ Church, Philadelphia, vs. County of Philadelphia*, 24 How., 300; 16 L. Ed., 602."

It must be conceded that a franchise granted, or contract made, by a California municipality cannot create any obligation upon such municipality, nor confer any right on the other party thereto, in excess of the power of the municipality so to do.

Williams vs. Wingo, 177 U. S., page 601 (1900):

This case involved the question of whether a license given to a second company to erect a ferry within one-half mile of one already under operation across New River in Virginia was a violation of franchise granted to first company.

By the statutes of Virginia authority was given to the county courts of the several counties to license ferries. The act of the General Assembly, passed March 5, 1840, contained this provision:

> "That it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one-half mile, in a direct line, of any other ferry legally established over the same watercourse."

In 1880 the county court of Giles county gave to the plaintiff in error a license to maintain a ferry across New River. On March 5, 1894, the General Assembly of Virginia passed an act providing:

> "That it shall be lawful for the county court of Giles county to establish a ferry at a point on New River, in said county, at a point around Eggleston depot, on the New River," etc. * * * Said court in establishing said ferry shall be bound by sections thirteen hundred and seventy-five, thirteen hundred and seventy-six, thirteen hundred and seventy-seven

(and a number of others); but section thirteen hundred and eighty-six of said code, so far as the distance of one-half mile is concerned, shall not apply to the establishment of said ferry at said place."

Under this act a license was given to the defendant in error to establish a ferry within less than half a mile of the ferry established by the plaintiff in error under his prior license.

Mr. Justice Brewer delivered the opinion of the court, and stated, in part:

"The contention of the plaintiff in error is that under the laws of the State of Virginia in force at the time of such action, the license granted by the county court to him to establish a ferry created a contract between him and the State to the effect that no other ferry should be established within half a mile; and that the act of 1894 and the subsequent proceedings of the county court of Giles County impaired the obligation of that contract, and, therefore, were repugnant to section 10, Article 1 of the Constitution of the United States.

"This is an obvious error. The act of 1840 was one of general legislation, and subject to repeal by the General Assembly. No rights could be created under that statute beyond its terms, and by it no restraint was placed upon legislative action. When the General Assembly gave to the county courts power to license ferries it by that act in effect forbade them to establish a second ferry within half a mile of the one already established, but that bound only the county court. It did not tie the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. A contract binding the State is only created by clear language, and is not to be extended by implication beyond the terms of the statute.

(Other cases were cited.)

"In the case at bar the only effect of the act of 1890, while in force, was, as we have said, to tie the hands of the county court. It operated in no manner

> as a restraint upon the legislature or as a contract upon its part that the State would not act whenever in its judgment it perceived the necessity for an additional ferry. The fact that in this case the special authority was given to the county court is immaterial. A general act forbidding county courts to license additional ferries is not infringed by a subsequent act giving special right to a single county court to establish a particular ferry. No promise made by the legislature by the first act is broken by the second."

The principle announced by the court in the above case has never been modified in any degree, so far as we have been able to discover.

The facts of the case before this court now and the case lastly referred to are identical in principle. The legislature of the State of California did not give to the city the power to grant exclusive franchises and the city did not purport to grant exclusive franchises. The legislature did give to the municipality the right to grant street railway franchises, subject to a limitation contained in section 499, which limitation was imposed to meet existing conditions as the legislature then saw them. The legislature vested the municipality with the power to grant certain street railway franchises. This did not mean that the same legislature could not at some future time vest the municipality with authority to grant other and additional franchises, or to modify or remove the limitations contained in section 499. The State is sovereign in the exercise of this power, and until it binds itself by granting exclusive franchises, or vesting municipalities with the power to grant such exclusive franchises, and under which vested power they have acted, the State has not exercised its final power in that regard.

Complainant does not question the rule that the police power is a continuing one. That rule has been so frequently announced and consistently adhered to that we will not burden this argument with authorities thereon, other than to quote from one of the recent cases in the Supreme Court, to wit:

Baltimore vs. Baltimore T. & G. Company, 166 U. S., 673; 41 L. Ed., 1160:

> "If it be said in this case that the City had already regulated the use by prescribing that there should be two tracks, the answer is that this power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition today and to another and additional one tomorrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously. *New Orleans Gaslight Co. vs. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S., 660-672 (20:516-524); *New York & N. E. R. Co. vs. Bristol*, 151 U. S., 556, 567 (38:259, 273)."

Grants of Franchises and Special Privileges are Construed Strictly and in Favor of the Public.

The proposition stated is true whether a franchise for the operation of a street railroad be granted by the legislature directly or by the city under authority of a State statute, or in either case where we are considering the applicability of a general law of the State.

Regardless of whether section 499, particularly the latter clause of the section, is a regulatory provision, enacted under the police power of the State, we contend that the present language of the section is controlling in this case, under the doctrine of construction stated above.

It should be borne in mind that section 499 refers to corporations which may be granted permission to use the streets. It is a limitation upon the power to grant, conferred by section 497. The municipality is not expressly included in the language of either section. The municipality needs no grant or special franchise to use its own streets. The city cannot be included by way of implication if we are to con-

strue a right or franchise granted most strictly against the donees and in favor of the public. The proposition announced above is so well established by the courts of the country that quotation from the decision is not necessary other than to show the applicability of some of the cases to this case.

Tillamook Water Co. vs. Tillamook City, 150 Fed. Rep., 119:

> "The plain and complete answer to the appellant's contention is that, by the contract upon which it relies, the city did not agree not to establish a water system of its own for the supplying of the city and its inhabitants with water. Not only is there no express agreement to that effect, but there is not a word or a syllable in the contract even tending in that direction: and, even if there was, the law is that a municipality cannot exclude itself from competition in such a matter by mere implication, for 'we are to remember', said the Supreme Court, in the very recent case of *Vicksburg Water Co.*, U. S. Supreme Advance Sheets, July 1, 1906, 26 Supt. Ct., 660 (202 U. S., 453; 50 L. Ed., 1102), 'the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and land cases, and we have no disposition to detract from its force and effect, and, unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of its contract, it cannot be held to have done so by mere implication.'"

The above language is from the decision of Judge Ross in the Court of Appeals.

The leading cases in the Supreme Court are cited by Judge Gilbert in his opinion in the Circuit Court in the same case, found in 139 Federal, at page 406, as follows:

> "The principles which must control the decision of the present case are to be found in *Charles River*

Bridge Co. vs. Warren Bridge Co., 11 Pet., 420; 9 L. Ed., 773, 938; *Long Island Water Supply Co. vs. Brooklyn,* 166 U. S., 685; 17 Sup. Ct., 718; 41 L. Ed., 1165; *Bienville Water Supply Co. vs. Mobile,* 175 U. S., 109; 20 Sup. Ct., 40; 44 L. Ed., 92; *Skaneateles Water Co. vs. Skaneateles,* 184 U. S., 354; 22 Sup. Ct., 400; 46 L. Ed., 585; *Joplin vs. Light Co.,* 191 U. S., 150, 24 Supt. Ct., 43, 48 L. Ed., 127, and *Helena Waterworks vs. Helena,* 195 U. S., 383; 25 Sup. Ct., 40; 49 L. Ed., 245. In the first of these cases the court declared the general doctrine, which has been followed in all the subsequent decisions, that public grants are to be construed strictly, and that in such grants nothing passes by implication. In the second case the court said: 'The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the street of the town, and contained a covenant on the part of the town to pay certain hydrant rentals; but *grants from the public are strictly construed in favor of the public,* and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege.' "

Helena Water Works vs. Helena, 195 U. S., 392; 49 L. Ed., 250.

"It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable, and perhaps unprofitable; but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract."

The cases are again reviewed and the rule again stated by Mr. Justice Harlan in Knoxville Water Company against Knoxville, 200 U. S., 33; 50 L. Ed., 359, as follows:

"Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public." Such were the words of this court in *St. Clair County Turnp. Co. vs. Illinois,* 95 U. S., 63; 24 L. Ed., 651, 652. The universal rule in doubtful cases—this court said in *Oregon R. & Nav. Co. vs. Oregonian R. Co.,* 130 U. S., 1, 26; 32 L.

Ed., 837, 842; 9 Sup. Ct. Rep., 408—is that "the construction shall be against the grantee, and in favor of the Government." As late as *Coosaw Min. Co. vs. South Carolina*, 144 U. S., 550, 562, 36 L. Ed., 537, 542; 2 Sup. Ct. Rep., 689, 691, this court said: 'The doctrine is firmly established that only * * * that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, "is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell vs. Grandjean*, 111 U. S., 412, 438; 28 L. Ed., 321, 330; 4 Sup. Ct. Rep., 475. We have never departed from or modified these principles, but have reaffirmed them in many cases.

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If, by contract or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

One of the latest expressions of the Supreme Court on this subject is found in *Madera Water Works vs. Madera*, 228 U. S., 454; 57 L. Ed., 915, where the court says:

"But if, when the plaintiff built, the constitution of the State authorized cities to build waterworks as well after works had been built there as before, the plaintiff took the risk of what might happen. An appeal to the 14th Amendment to protect property from a *congenital defect* must be vain. *Abilene Nat. Bank vs.*

Dolley, 228 U. S., 1, 5; *ante*, 707; 33 Sup. Ct. Rep., 409. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the constitution so as to avoid the result if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.

"The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. *Hamilton Gas Light & Coke Co. vs. Hamilton*, 146 U. S., 258; 36 Law Ed., 963; 13 Supt. Ct. Rep., 90; *Joplin vs. Southwest Missouri Light Co.*, 191 U. S., 150, 156; 46 L. Ed., 127, 129; 24 Sup. Ct. Rep., 43; *Helena Waterworks Co. vs. Helena*, 195 U. S., 383, 388, 392; 49 L. Ed., 245, 248, 250; 25 Sup. Ct. Rep., 40. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it has given to the plaintiff was held not to preclude the city itself from building waterworks of its own. *Knoxville Water Co. vs. Knoxville*, 200 U. S., 22, 35; 50 L. Ed., 353; 26 Sup. Ct. Rep., 224. Compare *Vicksburg vs. Vicksburg Waterworks Co.*, 202 U. S., 453, 470; 50 L. Ed., 1102, 1111; 26 Sup. Ct. Rep., 660; 6 Ann. Cas., 253. As there is no contract, the plaintiff stands legally in the same position as if the constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show."

Other cases to the same effect are cited in our points and authorities *supra*.

The city and county of San Francisco is no more a railroad corporation than the city of Knoxville was a water corporation.

We repeat again, setting aside for the moment the interpretation of section 499 as a regulatory provision enacted

under the police power of the State—there is nothing in section 5 of the franchise showing an intention to exclude the municipality itself, and such a provision would be wholly unauthorized if it were found there; nor is there any express inclusion of the municipality in section 499 of the Civil Code, which complainant claims forms a part of its contract. The doctrine of strict construction applies just as much to the provisions of the general law of the State if it is to be considered a part of complainant's contract.

Crossing of Complainant's Tracks Not a Taking or Damaging of Property Without Due Process of Law, and Does Not Require that Compensation be First Paid.

The above proposition is true for the following reasons:

1. It is a general rule of law that the lines of one street railway may cross the lines of another without compensation.

2. Section 500 of the Civil Code is contained in Title 4 of that code dealing with street railways. The reference in section 500 to chapter II, title 3, relates only to the *manner of the crossing*, and not to the provision for compensation.

3. The provisions of section 469, title 3, providing for compensation for cutting and adjusting the rails and resorting to condemnation of the right of way, are not, by the provisions of section 510, made applicable to two street railways crossing each other.

I.

Rule as to Street Railroad Crossings.

It is undoubtedly the general rule, supported by reasoning which cannot be assailed, that one street railway company crossing the tracks of another street railway company is not

obliged to compensate the other company for the crossing. A case which forcibly states this doctrine is

> The Consolidated Traction *vs.* South Orange and Maplewood Traction Company, 56 New Jersey, Equity, 569.

For the reason that the principle is so unanswerably stated in the opinion of the court, we quote therefrom at length:

> "Considering the question, therefore, upon its merits, I shall apply the principles relating to it which seem to me to be settled by our decisions above referred to, especially in the *Hinchman Case*, the *Heasley Case*, the *Morris* and *Essex Railroad Case* and the *West Jersey Railroad Case, supra*. These cases settled that electric street railways, operated by the overhead trolley system with its poles and wires, are not additional burdens upon the soil of the highway, and that these structures may be placed in the public streets without compensation to the owner of the soil, subject to the public easement of passage, and other ordinary uses of a highway. They also settle that a steam railroad, lawfully constructed across a public street cannot exclude the public from the right to use the highway at the point of crossing, or from crossing their tracks by street cars operated by either horses or trolley, except to the extent that interference may be necessary to permit the lawful operation of the steam railroad at the point of crossing. These principles, as it seems to me, control the right of trolley companies, whose tracks are laid longitudinally in the public street, to prevent the crossing of their tracks. They can only prevent this crossing as far as the crossing interferes with or prevents the operation of their road or the exercises of their franchises. Their tracks occupy the streets, longitudinally, without compensation to the abutting owner, only upon the theory that they provide a method of passage over the street which does not interfere with the ordinary use of the streets for public travel, and that their construction or operation in their ordinary mode does not exclude or prevent reasonable crossing of its tracks by the public. And the right of the legislature or

of a municipality under the authority to provide for crossing of tracks already laid down by other tracks operated in the same manner, seems to rest upon the same foundation as the original right of the complainant to construct its own tracks in the public streets, and operate by overhead trolley, without compensation. The right of one street railway to cross another street railway already constructed, is the same legitimate use of the highway as the construction and operation of the original road, and the original right to operate and construct a road in the public streets is necessarily subject to all legitimate purposes of crossing. This would include the methods of crossing made necessary by the development of legitimate methods of using the streets for travel. Nor does the fact that the crossing, as at present proposed, necessitate some actual interference with the tracks and wires as constructed, and to some extent changes thereafter the exclusive use by complainant at the crossing, prevent the crossing by a similar railway company without compensation, if made under the proper legislative authority. For these changes are the necessary result of the development of the method of operating electric roads at their points of crossing, and are such as are made necessary as the best and safest methods now attainable for the safety and convenience of the public in the operation of both roads at the point of crossing. They are, therefore, changes and burdens in the use of its tracks and trolley system, to which the original right to lay and construct them was necessarily subject, and, in a legal point of view, are different only in degree, and not in character, from the changes in the property and control of its tracks made in the ordinary horse car crossing. By reason of the operation of both railroads by electricity supplied by overhead wires, the actual joint use at the point of crossing, which was, with the horse railways, confined to a short space on the tracks and surface of the ground, is now extended to a more complicated system of tracks on the surface, and also of wires overhead. But it is still, in the whole extent of the crossing appliances, and in every part thereof, merely a crossing in the safest and best manner by two street railroad companies, each of which has the right to use electricity at the place of

crossing, with the proper tracks and wire system for that purpose. The use of the whole system, although a complicated use, is still, in its essential nature, only a joint use of the public highway at the point of crossing for the *sole* purpose of crossing, and, inasmuch as the complainant's tracks and wires were originally laid and constructed subject to the right of the proper authorities to disturb them for the purpose of legitimate public travel in the public street across their tracks, and the changes and disturbances, are necessarily incident to such crossing, these are not, in my judgment, the subject of compensation. If the complainant is to be compensated for the changes in its property to which it is subjected, solely by the necessity of providing for legitimate public travel across its tracks, and can prevent such travel on the streets from crossing its tracks until compensation for the changes in its property and damages (whatever they may be) arising solely from the necessary provisions for such travel, then a situation arises in which it may be necessary to consider whether the structures which complainant has erected in the street have not now become such as interfere with and obstruct public travel at the point of crossing, and for such exclusive benefit of the complainant that they go beyond its rights of occupation of the street, and whether the company, on its part, has not become subject to claims for compensation based on the imposition of an additional burden on highways, at the point of crossing, for its exclusive use. The only basis for the existence or continuance of complainant's structures in the street, without compensation, is that they do not substantially interfere with the ordinary and proper use of the highway for public travel, and so long as the structures it erects are kept within its limits, no right to compensation would arise, but if the structures it now erects do interfere with legitimate public travel across its tracks, by methods of travel which are legitimate on the other portion of the public street, then, as it seems to me, the complainant has erected and is operating a system which is no longer a mere instrument for public travel over the highway, subject to the right of the public to cross it in any legitimate manner, but has, by its structures, interfered with and obstructed a cer-

tain portion of the legitimate travel across its tracks. And if these structures of complainant cannot be safely or reasonably crossed by such legitimate travel, without compensation, then the operation of them goes beyond the original limitation of complainant's right to occupy the streets for travel in common with the public, and as to the legitimate travel in crossing, complainant's structures are not entitled to be protected by injunction for the purpose of securing compensation.

"I reach the conclusion, therefore, on the merits of the question, that the complainant is not entitled to compensation for damages to its property by the proper construction of this crossing, and as the crossing, when properly erected, will not interfere with the exercise of its franchises, the application for preliminary injunction on this ground of right to compensation is refused.

"This conclusion agrees with the principles settled by the decisions of the courts of other states, in cases involving the right of crossing in public streets, so far as I have been referred to them. These are cases of street car tracks crossing steam railroads, and deny this right to compensation."

The rule so clearly announced by the above case is supported generally by the text writers who cite numerous cases in support of their text.

Nellis on Street Railways, Vol. 1, p. 254, sec. 108:

"The right of a railroad company to cross or occupy any part of the streets of a city constitutes a mere easement. It gives no title to the street itself. Therefore a street railway company operating under proper municipal authority may construct its lines across the tracks thereof without instituting condemnation proceedings or paying damages therefor unless the statute provides to the contrary. Where a city is vested with power to say whether or not a street railway shall be operated on any of its streets, and it authorizes the construction and operation of a street railway along a street which is a public highway, another street railway company whose tracks

such railway will cross cannot enjoin the construction over its rights of way by the company having the later franchise on the ground that such right can only be acquired by condemnation. To deny street railways the right to cross other railroads would be to confine their expansion and usefulness within narrow limits.

Where a railroad crosses a street along which a street railway company is authorized to construct its lines such company has an implied right to cross the tracks of such railroad as a means necessary to carry out the public purpose for which it was incorporated. So where a suit in equity was brought by a railroad company to enjoin the construction and operation of a street railway, upon a certain street, and crossing its tracks at grade, on the ground that such crossing would cause inconvenience to it in the operation of trains, and add to the dangers of the street crossing, it was held that these facts standing alone did not constitute a ground for injunction. The railroad whose tracks are crossed cannot complain because the street railroad company crossing is permitted to operate an electric line; it must submit to the inconveniences that may result from the growth and development of the city and the consequent increase of and change in the modes of travel."

Am. and Eng. Ency., 2nd Ed., vol. 27, p. 24:

"A franchise for the operation of a street railway on a public street does not confer any right of exclusive occupancy of the street nor clothe the owner thereof with power to prevent the crossing of its tracks by another company having a franchise to operate a railway on an intersecting street."

Lewis on Eminent Domain, vol. 2 (3d ed.), section 424, p. 768:

"Street railroads being held to be a proper street use, may cross railroads of all kinds laid across the street, without compensation. It is the duty of the street railroad to construct the crossing at its own expense, and the general rule is that if it is proceeding to do so in a proper manner it cannot be enjoined."

It must be assumed by the court that these crossings will be made in an improved and up to date manner. The character of such crossings are seen in the streets of every large city in the country. No street railroad system could be established without crossings. If complainant's contention is correct that the law of California is different from that announced in the case of Consolidated Traction *vs.* South Orange, etc., it is quite remarkable that the right to compensation has not been frequently asserted by street railway companies whose tracks have been crossed by the tracks of other street railway companies.

The only case in which the question of the right of one street railroad to cross the tracks of another street railroad ever arose in the Supreme Court of California is that of the Market Street Railway Co. *vs.* The Central Railway Company, 51 Cal., 583. In this case the doctrine is laid down *contra* to the position taken by counsel for complainant. Since the decision in the Supreme Court in the case just referred to, no case has arisen, as far as we are aware, in which the same question has been involved. The case therefore stands as the authority in that State upon the question, and it is amply supported in reasoning. We shall hereafter more fully discuss this decision.

II.

Construction of Section 500 of the Civil Code.

Complainant, of course, took its franchise subject to the provisions of that section. The *extent* of the easement, so far as crossings are concerned, is controlled by section 500. We have shown the general rule to be that a street railroad company is not entitled to compensation when the lines of another street railroad company crosses its tracks. The reason for this rule is obvious.

Crossings necessarily must be made. The right of a street railway company in the street is a right to use the street for

railroad purposes and maintain tracks therein for public convenience. It would be a strange rule which would allow a company to obtain a franchise to lay down tracks in a street for railroad purposes upon the theory that it is serving a public necessity, and that such a use does not unreasonably interfere with the ordinary and customary use of the street by the general public, but which would require another company acquiring identical rights to compensate the first company for crossing its tracks.

While the rule that "statutes in derogation of common law must be strictly construed" has been abrogated in California, it is nevertheless elementary law that statutes are never given a construction which leads to absurd results when such a construction can be avoided. This rule is liberally applied in favor of the public, as the cases we have theretofore cited show. It would be absurd to grant to a street railway corporation a right to maintain tracks in the street and to include in the grant the right to insist that every other street railway corporation obtaining the same rights must pursue condemnation actions before that company could cross the tracks of the *first* company.

Section 500 of the Civil Code reads as follows:

> "*Crossing tracks. — Obstructions.* — Any proposed railroad track may be permitted to cross any track already constructed, the *crossing* being made as provided in chapter two, title three, of this part. In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days."

Here, by direct law, complainant's predecessors in interest took the franchise subject to the right of any other company obtaining a franchise for a street railroad to cross the tracks of complainant's predecessors. So far as crossings are concerned, this is the *extent of complainant's easement.*

Section 500 refers to chapter II, title III, of the Civil Code dealing with railroad corporations generally as distinguished

from "street railroad corporations" which is the special subject dealt with in title IV in which section 500 is found.

Section 469 of that chapter and title reads as follows:

> "*Crossings and intersections, condemnation.*—Whenever the track of one railroad intersects or crosses the track of another railroad, whether the *same* be a street-railroad, wholly within the limits of a street or town, or other railroad, *the rails of either or each road must be so cut out and adjusted as to permit the passage of the cars on each road with as little obstruction as possible;* and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under title seven, part three, Code of Civil Procedure, and the damage assessed and the right of way granted as in other cases.

Section 469 specifically governs crossings of a steam railroad over the right of way of another steam railroad, and the crossing of the tracks of a street railroad by a steam railroad. The first half of the section provides how the *crossing shall be made.* The second half of the section provides for the compensattion that must be paid by the company crossing the tracks of another.

Section 500 does not incorporate in that section all of the provisions of chapter II, title III, and does not incorporate by reference any particular section of that chapter and title. It incorporates only so much of that chapter and title as provides how *crossings shall be made.* Therefore, we submit that only that portion of section 469 is incorporated which pertains to the method of crossings, namely, that "*the rails of each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible,*" and that the balance of the section has nothing to do with how the crossing shall be made. This is the reasonable and natural construction of section 500, and if

it had been intended to carry into section 500 the provisions of section 469 as to compensation, the matter could have easily been included therein by adding after the word *"crossing"* the words "and compensation" so that the section would then read "Any proposed railroad track may be permitted to cross any track already constructed, *the crossing and compensation* being made as provided in chapter two, title three, of this part."

The case of

> "Market Street Railroad Company (the predecessors in interest of complainant) *vs.* Central Railroad Company," 51 Cal., 584,

has been already referred to.

The Central Railroad Company's franchise was granted subsequent to the adoption of section 500 into the Code. The particular franchise to Market Street Railroad Company in question in that case had been granted prior to the insertion of this section in the Code. If the Central Railroad Company was granted the right under its franchise to cross the tracks of another company, it would be obliged to do so under the provisions of section 500 of the Civil Code, which was the law at the time its franchise was granted and also at the time it attempted to make the crossing and the action referred to was commenced. The exact question presented to the court was whether one street railroad company had the right to cross the tracks of another, and that was being done without condemnation. The attention of the court is directed to the brief of counsel for appellant found on page 585 (51 Cal.) in which the case of Appeal of N. B. & M. M. R. R., 32 Cal., 510, 511, 512, is cited and also to the fact that counsel there argued "one street railway cannot cross another save under express statute authority upon compensation made." The court, however, held in a short decision, that the right of the appellant Market Street Railroad Com-

pany to maintain its tracks in the street did not exclude the right of defendant to cross its tracks.

In the opinion the court said:

> "The maintenance of horse-railroads, and running of cars upon the public streets of the city of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street, nor does it prevent the crossing of its tracks by another railroad maintained for a similar purpose, provided the crossing is effected with as little damage as may be.
>
> "We see nothing in the circumstances here which required the interposition of a court of equity to enjoin the Central R. R. Co. from maintaining their road in the manner they appear to have pursued."

We have made the foregoing argument treating the city as occupying the same position as that of a private railroad corporation. This is not the position of the city, of course, as we have shown. But its position for the reasons hereinbefore advanced could not be less favorable.

Since writing the foregoing we have been furnished with copies of complainant's brief.

In rather summary fashion the complainant disposes of all questions in reference to crossings and the applicability of the latter part of section 469 to cases like that before us by referring to section 510 of the Civil Code of California. The assertion is rather dogmatically made that because the words "so far as they are applicable" are used in section 510, therefore, anything which may appear in the preceding sections in title 3 will be held to include street railways. Such a construction we think illogical, and the particular language employed in section 510 would negative complainant's argument. "Street railways are governed," would seem to indicate, in the choice of the verb, a particular intention upon the part of the legislature. Title 3 of the Code is divided into three chapters. Chapter 1 is entitled, "Offices and Corporate

Stock"; chapter 2, "Enumeration of Powers"; chapter 3, "Business, How Conducted."

Strictly speaking street railroads, signifying the physical thing itself, are not "governed." The corporation or person owning and operating the road is "governed," because government operates upon individuals and corporations, and not upon inanimate things.

Going through title 3 section by section, it will be observed that the whole of chapter 1 deals with railroad corporations generally. The subject-matter of the chapter is the management of the corporation, assessments of stock, borrowing of money, providing a sinking fund to pay bonds, fixing of capital stock, and certificate of payment of fixed capital stock. The term used in this chapter is "railroad corporations." Therefore, the whole of chapter 1 of title 3 is applicable to street railroad corporations.

Chapter 2, as already stated, enumerates the powers of railroad corporations. Without analyzing every section of that chapter, we believe the language in this chapter, with two exceptions, pertains to operation of steam railroads as distinguished from street railroads. The railroad corporations contemplated in the section are authorized to do various things, as for example, to cause examination and surveys to be made of their routes, to lay out the roads not exceeding ten rods wide, to construct the roads across and along streams, water courses, bays, etc. They are obliged by section 466 to file maps of their roads. They are authorized by section 467 to change their routes, and by section 468 their franchises may be forfeited unless the work is commenced and completed within stated periods. Section 469 is the section pertaining to crossings by roads, which section we will hereafter discuss. By section 470 they are not permitted to use the streets, alleys, or highways, or any land within a city without a two-thirds vote of the city authorities. By section 477, State land is granted to these corporations for the construction of their roads.

All of these sections, with the exception of section 473, unless the court gives to section 469 a construction which we do not believe that the section will sustain, clearly refer to and contemplate powers and obligations of steam railroads. Section 473 can be made applicable to street railroad corporations. That section provides at considerable length for the consolidations of two or more *railroad corporations,* and, as we say, this section can be made applicable, and is applicable, so far as its terms are concerned, to street railroads.

Chapter 3, as already stated, is entitled "Business, How Conducted." With the exception of section 494 of that chapter, a reading thereof clearly indicates that the whole of that chapter, with that exception, is dealing with the conduct of the business of a *steam road corporation.* For example, section 479 provides that checks must be affixed to every package or parcel when taken for transportation. Section 480 provides that an annual report must be made to the Secretary of State, of those things which are only within the business of a steam railroad corporation. Section 481 provides that it must run its cars for transportation of persons or property at such regular times as it shall fix by public notice. Section 482 provides that upon refusal to receive any passenger or property, damages may be recovered. Section 483 requires that accommodations must be furnished to every one to whom a ticket is sold, and section 484 that printed rules and regulations regarding fares and conduct of its passengers must be conspicuously posted, and that if any passenger is injured from the platform of a car, or any baggage, wood, gravel, or other car in violation of any of the printed regulations, the corporations is not responsible, unless the corporation failed to comply with the regulation that sufficient accommodations must be furnished the passenger, as provided in section 483. Section 485 provides that the corporation must maintain fences along railroads and fixes damages for killing of stock. Section 485-A provides that owners of the property through which a railroad

runs may have private right crossings under certain regulations and conditions.

Section 486 provides that a bell weighing at least twenty pounds must be rung at every crossing. We will not review the rest of the chapters, but they, too, pertain to matters as of the character of the foregoing.

Section 494 of chapter 3 is general in its terms, and is applicable to a street railroad corporation the same as any other railroad corporation. This section provides for the sale of the property and franchises of *one railroad to another railroad*. It goes into considerable length as to the procedure of such sale, and how such sale may be legally made. The particular object that we have in thus analyzing title 3 is to show that by reading title 3 section by section there are sections to be found in all three chapters of that title which are applicable to street railroad corporations as well as steam railroad corporations, and the language of each section itself clearly indicates that it is dealing with railroad corporations in general in some places and dealing with steam railroads specially in others. Now, of course, if we are to construe the language of section 510, "so far as they are applicable," to mean anything that can be made to apply, rather than to construe the section with appropriate regard of what was intended by the legislature in passing these various sections, and give our construction thereof a sound and reasonable one, many of these sections which, as already stated, would be impracticable in a sense in the operation of a street railroad, but nevertheless would be capable of execution. It would be possible for a street railroad to ring a bell weighing at least twenty pounds at every crossing and that every corporation must start and run its cars for the transportation of passengers at such regular times as shall be fixed by *public notice*, and on being tendered the fare therefor furnish to every person desiring a passage on the passenger car, a ticket, and other examples of the same character could be given. Those provisions of title 3 which are to be incorporated in title 4 are those sections which can be taken bodily from title 4 and

become a part of title 4 without substitution of terms as such terms were used in title 3. In other words, by way of example, it is apparent that section 490 refers solely to a steam railroad when it provides that every railroad corporation must provide and furnish a passenger a ticket upon being tendered the fare. But the provisions of chapter 1 of title 3 pertain, as the title specifically states, to railroad corporations in general and by their terms are capable of including street railroad corporation as well as any other corporation.

Coming to section 469, a reading of that section and an observation of its punctuations show that the subject-matter dealt with is the crossing of a track of a steam railroad over the track of another railroad, whether that other railroad be a street railroad wholly within the limits of a city or town, or any other railroad. In other words, the section as it stands cannot be construed as covering the crossing of a street railroad over a steam railroad or another street railroad. Observe the language and punctuation: "Whenever the track of one railroad intersects or crosses the track of another railroad, whether the same be a street railroad, wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible * * *." The provision, whether the same be a street railroad wholly within the limits of a city or town, clearly refers to the railroad whose tracks are crossed. Now, for this section to be taken over into title 4 the terms of the section would necessarily have to be changed so that the section would read,—"Whenever the tracks of one railroad whether the same be a street railroad or other railroad intersects or crosses the tracks of another railroad, whether the same be the tracks of a street railroad or other railroad, the rails of either or each road must be so cut, * * *."

The cases cited by counsel for defendant, on pages 84 to 90, upon the point now being discussed, are all cases, with the exception of two, of one steam railroad crossing the

tracks of another. As to the rule that in such cases compensation must be made for the crossing, we are not here concerned nor are we disposed to quarrel with the rule. The two cases referred to in complainant's brief which are street railroad cases, are the case of the Birmingham Traction Company *vs.* Birmingham Railroad Company, 1898, 119 Ala., 24 S. C., 368, and Omaha Horse Ry. Co. *vs.* Cable Tram-Way Co., 30 Fed., 324, same case, 32 Fed., 727. The Birmingham Traction Company case was the case of a street railroad company attempting to cross the tracks which were laid on a private right of way belonging to another corporation without compensation being made. (See last paragraph of opinion.) The court holds that the company desiring to cross the private property of the complainant could not do so without compensation being made. With this principle we find no fault.

The Omaha case will be discussed hereafter.

As already pointed out, the rule unanimously announced by the courts, with the possible exception of the Omaha case, is that one street railroad corporation crossing the tracks of another street railroad corporation need not compensate that company for the cutting of the rails. Not only is this the rule of law, but counsel for the complainant, with all their industry, have not pointed out the code or statute of any State which requires compensation to be made where one street railroad corporation crosses the tracks of another street railroad corporation.

Another thing to be observed with reference to section 469 is this: Section 500 expressly confers upon one street railroad corporation the right to have its tracks cross the tracks of another street railroad. Section 469 does not confer that right upon one steam railroad to cross the tracks of another steam railroad or the tracks of a street railroad without compensation, and the right is given to the railroad, whether it be a steam railroad or a street railroad, whose tracks are sought to be crossed, to compel the steam railroad desiring to cross its tracks, to commence a suit in eminent domain

and there obtain a decree not only fixing the amount that shall be paid in damages, but likewise a decree condemning the right of way "over the one for the use of the other road." Now, if section 510 was intended to go to the extent that complainant claims for it, what earthly necessity was there for the legislature to insert section 500? The Codes of California when adopted were intended to express either the common law or such changes in the common law as the State of California desired to make. With the general rule of law before the framers of the Code, that one street railroad need not compensate another street railroad for crossing its tracks, it seems evident that section 500, in declaring that one street railroad may cross the tracks of another street railroad, embraces the common-law rule that compensation need not be made. However, in *making the crossing* it shall be done as provided in section 469. The constructions that we have given to section 500 and section 510 are entirely consistent with each other. Section 510 incorporates only so much of title 3 as pertains to railroad corporations in general. Section 469 pertaining, as we have pointed out, to the crossing of a steam railroad over the tracks of a street railroad or other railroad, it was necessary for the code framers in regulating the manner of crossings by street railroads to either make express provisions in section 500 for the manner in which crossings should be made, or, by general reference as they did, incorporate so much of section 469 as pertains to *crossings*. The incorporation of any provision of title 3 into title 4 is made by reference only.

A good statement of the rule of construction as applied when one statute is adopted by reference into another is found in the decision of Lord Denman, C. J., in re Comm'rs Lunatic Asylums, Eq., Series 366, Reg. *vs.* Stock, 82 Ad. & E., 405;

> "It is a sound rule of construction applicable to modern as well as ancient statutes, perhaps even more so from necessity in consequence of the looseness of expression which now prevails, that in construction of

> general reference in acts of Parliament, such references must be made as will stand with reason and right."

Summarizing the proposition advanced, it is submitted that section 500, having dealt with the matter of one street railroad crossing the tracks of another street railroad, the whole subject-matter of such crossing was dealt with in that section, and dealt with in accordance with the general rule of law; that the legislature intended that it should cover the whole subject-matter; that section 510 only purports to incorporate into title 4 such matters as "govern" the business and affairs of railroad corporations in general, and not those matters which from the context clearly pertain to steam railroads specifically.

Public Convenience and Necessity Demanded that the City Take the Action it Did.

The testimony of City Engineer O'Shaughnessy, A. S. Baldwin, C. C. Young, witnesses for defendants, and the communication from United Railroads of San Francisco addressed to the Board of Supervisors of the City and County of San Francisco under date of January 11, 1915, show the impelling necessity for added transportation facilities. Quotations from the testimony of these witnesses and from the written communication from the United Railroads of San Francisco are set out in our statement of facts.

The officers of the municipality would not have performed the duty they owed to the public if they had not taken steps to relieve the acute transportation problems then facing the city. It was for the purpose of solving in part such problem that Twin Peaks Tunnel was bored at a cost of approximately four millions of dollars.

Complainant admitted the difficulties of the transportation problem in the communication referred to (Tr., pp. 311 to 315). The inability of the company to furnish relief is set out in the answer of the company to the first question

submitted to the company by the Board of Supervisors. The complainant company frankly says:

> "The present policy of the United Railroads in the matter of extension of existing lines would be to meet the conditions of the growth of the city were such a policy practicable. But unfortunately, by reason of the restrictions contained in the charter, it is impossible for any private corporation to finance the construction of any street railroads in any part of the city. These charter conditions may be briefly referred to as follows:
>
> "(*a*) Minimum wage scale, $3 for eight hours, with time and a half for overtime.
>
> "(*b*) Reversion of all physical property to the city at the end of the franchise period, which is limited to twenty-five years.
>
> "When to this condition is added the heavy tax burden, it makes an impossible financial proposition."

Here is a confession by the United Railroads that it is unable to build extensions of street lines into the outlying districts to furnish the much-needed transportation, and that it cannot and will not meet the public needs.

The situation on Market street itself was bad. The double tracks of complainant company, it asserted, were then taxed to their utmost capacity. The congestion, and its inability to cope with it, were thus described in its communication of January 11, 1915:

> "It cannot be denied that during the so-called rush hours, the cars are overcrowded, but it is not true that by simply increasing the number of cars this condition can be ameliorated on those lines to which this criticism is particularly directed; the addition of cars would only tend to make a bad matter worse by reason of the fact that the capacity of the tracks in the downtown section, where the overcrowding is greatest, has already been reached, and adding cars would tend to decrease the scheduled speed so much, that the number of persons which we could carry by a given point within a given time would also be decreased."

If that was the condition on Market street in 1915, and we admit it correctly describes the congested car situation on the Market street tracks of complainant, what might the municipal officers, charged with the duty of doing those things necessary for the convenience and welfare of the public, expect to be the conditions a few years later. The city was growing steadily. As the outlying sections were built up, facilities must be furnished for the transportation of the people from these new districts into and through the heart of the downtown section. Relief could not be granted by putting additional cars on the Market street lines of the company. As we have already shown, Market street is the great artery of the city. People must use this street to reach the business center of the city. How was the municipality to solve this problem? There is only one practicable solution, and that is the plan carried out—to build the outer tracks on Market street from Seventeenth street to Kearny street and there connect with the outer tracks already on Market street from Kearny street to the Ferry, over which the municipal cars were operating by agreement with complainant company, and also to connect the Church street line with the Van Ness avenue line of the municipal railways.

The question of any added inconvenience to the public generally as a result of building the outer tracks was a matter solely within the discretion of the Board of Supervisors of the City and County of San Francisco. Serious inconvenience in this respect could not arise because of the great width of Market street. Four tracks on Market street would cause less inconvenience than two tracks on the main streets of many other large cities of the country. The only avenue of relief open to the city was to build the outer tracks on Market street.

We repeat that unless complainant company had an exclusive franchise covering these blocks on Market street, the city was not barred from taking the action it did to furnish the much-needed relief. If loss is suffered by complainant through competition, or even some loss by prospective pas-

sengers taking the municipal cars through their disinclination to cross the outer tracks for the purpose of reaching complainant's cars on the inner tracks, it is not a damaging or taking of their property contrary to the provisions of the Constitution of the United States or that of the State of California. Their franchise was not exclusive and therefore its terms are not violated. Each person or corporation using the public streets must suffer such inconvenience as may result from the use of the same street by other persons or corporations. In the regulation of traffic upon a crowded street, inconvenience and possible loss may be caused to persons or corporations who hitherto had a more free use of the street, but such regulation is necessary in the interest of the public good.

The question of how much, if any, inconvenience or loss of traffic will result to complainant because the municipal lines constituted the outer tracks on Market street is largely dependent on the traffic regulations made governing headway of cars, where the cars of the respective lines may stop for taking on or letting off passengers, and other similar matters. It must be assumed that such regulations will be fair and just. The manner of operating the cars on the respective lines is not an issue in this case and was not before the court, for the reason that at the time the case was heard no cars were operated on the tracks in question.

Why must the city forego furnishing this much-needed transportation which complainant company confesses its inability to supply? Because, according to the contention of complainant, when the legislature, in 1872, incorporated section 499 into the Civil Code—this section designed only as a limitation on the power of the city to grant under the authority conferred by section 497, and as a regulatory statute enacted under the police power of the State to meet conditions as the legislature then saw them—the section was forever beyond repeal or amendment after complainant's franchise was granted. It is unbelievable that such a con-

struction, which would paralyze the growth and development of the city, can be given to section 499.

And, finally, permit us to say that if the franchise of complainant was not exclusive, it was subject to all of its own inherent defects, one of which was the possibility that some time the municipality itself might enter into the same business on the same street.

The Soliciting of Offers of Sale of an Existing Street Railroad Satisfied the Requirement of Article XII of the Charter.

The resolution, soliciting offers and annexed to the answer of respondents, is one of a series of resolutions and ordinances passed by the Board of Supervisors of the city leading up to the issuance of bonds for the construction of certain municipally owned street railroads on streets enumerated in the proceedings. The solicitation for offers, therefore, must be read in conjunction with these proceedings, and, read therewith, it was quite easy for any railroad corporation owning and operating a street railroad in San Francisco to understand what street railroads the city desired to acquire, either by purchase or by original construction. It is true that the description of the Church Street line did not describe in detail the specific route. The proposition submitted to the electors was for the construction of a street railroad on "Van Ness avenue and from said Van Ness avenue along connecting streets to Church street, and along Church street to convenient terminals;" but this was all that is required by the charter in order that the city might incur a bonded indebtedness for the construction of the road, and nothing in the charter requires that the precise and exact route shall be set forth. The route described in the bond proceedings is definite enough to acquaint the electors, as well as the owners of existing railroads, of the route that was to be pursued generally. It was undoubtedly in the minds

of the framers of the provisions to leave the description of the route elastic enough to cover exigencies and emergencies.

The provision that offers shall be solicited is for the benefit of the electors in passing upon the question whether a bonded indebtedness shall be incurred. If there were any informalities in the issuance of bonds, a taxpayer could have prevented their issuance. While perhaps the pleadings are silent as to the sale of the bonds, there is enough in the pleadings to show that the bonds must have been sold and that the money to be used for the construction of the Church Street line on Market street between Seventeenth street and Van Ness avenue is available from the sale of those bonds.

Complainant, as the owner of a street railroad, cannot complain that the taxpayers were not sufficiently acquainted with the route of the Church Street line. Had complainant been willing to offer a railroad in operation to meet the demands for the acquisition of a railroad on "Van Ness avenue and from Van Ness avenue along connecting streets to Church street and along Church street to convenient terminals," it could have submitted its offer, together with a description of its property, to the Supervisors and the people could have had the benefit thereof in determining whether complainant's property should be acquired or whether original construction should be resorted to. In addition thereto, complainant does not allege or show it is the owner of a street railroad which it could or would have been willing to sell to the city that would satisfy the city's requirement, and the contention for this reason alone is without equity.

There is nothing in the provisions of section 2, of article XII, which would require the electors to accept an offer, although the price offered would be lower than the cost of original construction. We are at a loss to understand how complainant, as the owner of existing railroads, could prevent the city from constructing a street railroad with its funds obtained through a bond sale, because, perchance, there was a defect in the bond proceedings. For that matter, the alleged defect in the bond proceedings, if it existed,

would not in any way affect the *power* of the city to own, construct, and operate a municipal railway.

In the case of Platt *vs.* City and County, 158 Cal., 74, the court on page 89 of the opinion considered a resolution soliciting offers for a street railroad similar to the one under discussion and found no fault with it.

Counsel also contended that no offers have ever been solicited for a railroad on Market street, between Van Ness avenue and Kearny street, and between Seventeenth and Market and Castro streets. The answer to this is obvious. The proceedings of the Board of Supervisors relating to the construction of this portion of the Market Street line had, at the time of the commencement of this action, only reached a stage where preliminary plans had been called for from the city engineer. The proceedings, therefore, had not reached the point where section 2, of article XII, of the charter required the soliciting of offers.

ANSWER TO APPELLANT.

I.

No Property of Appellant is Taken or Damaged by the Building and Operation of the Municipal Road on Market Street.

The first half of appellant's brief, though subdivided into many chapters and sub-heads, really embraces but one subject—at least, culminates in one final proposition—upon which apparently appellant principally relies for a decision. Points I, II, and III, with their various alphabeticized subdivisions, present quite elaborately appellant's contention that its franchise is an irrevocable contract, the obligation of which will be impaired by the proposed municipal action of appellee; that it will be deprived of its property without due process of law; that its property will be taken without just compensation. With these are argued various interrelated points, and then the discussion of appellant reaches

its climax in the assertion that "the loss of patronage that will result to the complainant through the difficulty and danger of access to its cars by reason of the operation of the city's cars on municipal tracks between complainant's tracks and the sidewalk is directly within the constitutional prohibition against 'damaging' property without compensation 'first' paid."

In replying to this portion of the brief ending with page 76, we eliminate for the moment section 499 of the Civil Code of the State of California, the interpretation and construction of which we have already adverted to, and shall again touch.

This, then, is the position presented:

1. Appellant has a franchise from the City of San Francisco, authorizing the construction and operation of a street railway upon Market street.

2. Market street is the main artery of commerce, transportation and travel in that city.

3. Market street is of unusual width. That portion of it from Kearny street to the Ferry is unusually busy and constitutes one of the most crowded parts of San Francisco. From Kearny street to the Ferry, under agreement between the city and the appellant, there have been constructed tracks on either side of appellant's double-track railway, so that there are now on this portion of Market street four street railway tracks. The city operates its municipal cars from Geary street to the Ferry on the outer tracks and complainant operates its Sutter Street line alone on these outer tracks. All of the other lines of the appellant are operated upon the two inner tracks.

4. The City of San Francisco requires additional transportation facilities. The public welfare and necessity demand additional street railways. The appellant, conceding this fact, declines to construct additional lines or provide additional facilities. The city, therefore, has undertaken

the task. There is but one mode by which justice can be done its people, and the public welfare subserved, and that by connecting on Market street with its system already established there. The connection requires that for substantially fourteen additional blocks on Market street, exactly what is now being done for six blocks, by agreement of the parties, shall be done for the benefit of the city and to meet its absolute needs.

5. The franchise of the appellant is not an exclusive franchise, nor does it grant exclusive rights to appellant. The City of San Francisco has neither authority nor power to grant an exclusive railway franchise.

6. There is ample space on Market street to accommodate four tracks and the usual street traffic as well.

We are not dealing now with an abutting owner of the fee nor with proprietorship of the land traversed by the San Francisco municipal road, nor with invasion of appellant's easement in the soil between its tracks. We deal solely with a part of a street, for the purposes of this case unoccupied, over which the city authorities have dominion and power. In another part of this street the city has granted to appellant the right to operate a street railway. Can it be seriously claimed that the city's power by the one grant to appellant has been exhausted? If this be so, then a *non-exclusive* grant becomes exclusive, and a city, denied the power to grant exclusive franchises, by the very act of granting one not exclusive, exercises the denied power.

When the appellant took its franchise, it took it subject to the power of the city to grant similar rights.

> "Every corporation which acquires a franchise to use the city streets which is not by its terms or true construction shown or declared to be exclusive, takes the franchise subject to the power of the legislature or the city to grant similar rights to others."
>
> III Dillon Mun. Corp., sec. 1243.

We quote as well the concluding portion of the section:

> "The control of the streets above and below the surface is vested in the municipality, and if it sees fit it may authorize or require the later corporation to place its lines or appliances so near those of the first corporation as to make access somewhat inconvenient and expensive. The city cannot destroy the first corporation's lines or appliances, nor can it prevent reasonable access to them, but it is not obliged to consult its mere convenience or study to save it from expense to the detriment of the public. Hence, while the city could not grant to another the right to use the same space already occupied by a corporation, it could authorize the use of any other space provided access to the line or appliances of the first corporation was left open, even if it was less convenient and more expensive."

The public character and the paramount right of the inhabitants of a city in the streets seem entirely overlooked by appellant. Judge Dillon in concluding his discussion of abutting owners' rights sounds this warning:

> "The essential public character of streets ought never to be overlooked. Although the abutter has special and peculiar interests in the continued maintenance of the street in front of his premises, free from obstruction for non-street uses, which impair its usefulness to him, yet streets and highways are in their primary conception and essential character intended chiefly for public use for purposes of travel, passage and communication, and other legitimate street uses, and the rights of the abutter are justly subordinate thereto. The public and paramount rights in these highways ought to be exercised and controlled by the representatives of the people, that is, by the legislature or the municipality, acting under delegated authority; and any rule of law, resting alone upon judicial creation, which denies or materially restricts the paramount authority of the people over the uses to which the streets and highways may be devoted in the public interest, is of doubtful legal soundness and of doubtful economic value."
>
> III Dillon Mun. Corp., sec. 1245, p. 1996.

In summing up his elaborate dissertation on street franchises Judge Dillon says:

> "4. As legislative authority is necessary to enable a company to construct and operate a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company a property in the franchise and road, and hence no rival company has the right to use the track of the company which laid it down. Nor can an individual or another company, at pleasure and without legislative authority, construct a rival line in the same highway. But a legislative grant of authority to construct a street railway is not exclusive unless so declared in terms or by plain or necessary implication, and therefore the legislature may, at will and without compensation to the first company, authorize a second railway on the same streets or line, unless it has disabled itself by making the first grant irrepealable and exclusive."
>
> III Dillon Mun. Corp., sec. 1280.

The city, of course, had the right to use its own streets in providing for the wants of its people. Indeed, under the facts of this case, it not only had the right, but upon it devolved the duty to solve its transportation problems. To deny the city the use of an untouched portion of its streets in its paramount duty to serve its inhabitants, because it had granted a non-exclusive easement in another part of its streets, would destroy the essential public character of its highways and transmute their primary purpose.

> "Municipalities are generally invested with the power either to construct their own works for furnishing water or light, or to grant a franchise and make a contract with some corporation or individual for that purpose. The great weight of authority in the absence of something else to manifest a contrary legislative intent is to the effect that the exercise of one of these powers does not *ipso facto* preclude the adoption of the other, and that the mere fact that a franchise not expressed or plainly appearing to be exclusive, has been granted confers no right upon the

> grantee to object to a similar franchise being made, or to the exercise by the municipality of the power to construct its own works."
>
> III Dillon Mun. Corp., sec. 1308, p. 2160.

Upon the general principles which we suggest we do not attempt to multiply authorities. These may be found under the quotations from the various text-writers to which we advert. Our apology for suggesting principles general in character concerning which there is now a crystallization of sentiment is that the appellant apparently argues the possession of some peculiar or superior right in the streets of the City of San Francisco under its franchise, a right in the street, which we may infer is greater in degree, with stronger attributes than that of an abutting owner, and paramount even to the right of the public. On the other hand, we assert that the city's right to make additional grants of its streets is abundantly supported by authority, and that the appellant has acquired no more by its franchise than the right to use the streets as a highway in common with other citizens.

> "Whenever the public interest demands the legislature or the local authorities may grant the use of any streets, already occupied by a street railway, to another person, natural or artificial for similar purposes. That a city council cannot deprive itself or its successors of the right to make additional grants in or crossing the same street is abundantly sustained by the authorities."
>
> Booth on Street Railways, 2 Ed., sec. 108, p. 197.

We would be of little service to the court by a lengthy discussion of the authorities cited by the appellant, nearly all of which deal with the property rights of abutting owners, and many of which relate to steam railroads. The remedies of abutting owners are now firmly fixed, and the differences between steam railroads and street railroads apparently clearly defined. A mere examination of the text-writers and

the cases will leave even the casual reader little doubt as to the rights and liabilities of steam railroads, and the obligations due to abutting owners. The case here, however, cannot rest upon such conclusions. The appellant must finally assert its right, not upon the law defining remedies to abutting owners, nor injuries inflicted by steam railroads upon the right of way owned in fee by steam railroads, but upon some peculiar obligation arising from the specific facts of this particular controversy. A study of appellant's brief makes this apparently obvious, and in the final analysis its argument is substantially that the obligation of its contract is impaired; that there is a taking or damage of its property because its double-track street railway must be operated on the inner two tracks on Market street, while the city operates its street railway on the two outer tracks.

We have seen in the authorities cited that it is not every injury or damage that impairs the obligation of contracts; that contracts must necessarily be taken with the "congenital defect" (the language is that of the Supreme Court) that the paramount rights of the public may be subsequently asserted; that such assertion may decrease the value of a franchise or diminish the profits flowing from it. And we have seen that under such circumstances the contract having impressed upon it this congenital defect or burden there occurs no impairment of the obligation and no right accrues under the Constitution.

The issue may be narrowed, therefore, to the question whether the operation of the street cars of the city causes such physical interference with appellant's rights as legally to entitle appellant to injunctive relief. In the initial stages of an argument upon this subject, we think these propositions self-evident:

> *a*. That the city did not exhaust its power over Market street by the grant of the franchise to appellant.
>
> *b*. That the city had the right to grant other franchises upon Market street for street railways.

c. That competition from which appellant suffers affords no ground of action.

d. That injury to the convenience of appellant or inconvenience caused it give it no new right, and

e. That appellant took its franchise impressed with the condition or burden that other franchises of like character might be granted.

Of course, if these propositions be accurately stated, the conclusion would seem naturally to follow.

If the position of the appellant be sound, that the inconvenience and interference with access and deterring of passengers from taking cars upon the inner rails afford ground for injunctive relief, then there could never be two street railways upon the same street. Assume in a busy quarter of a modern city a double track street railway. Upon one side only is there another track and another railway operated. Obviously upon the schedules required by the exigencies of modern urban life the cars upon both railways will be numerous and run at the briefest possible intervals. A single track upon one side will deter some passengers, for a time at least, from taking the car upon the inner track. It will cause inconvenience, and, from the operation of this single track, will flow all of the consequences described by appellant, less only in degree. If appellant be right, because of this interference the single track road could not be operated; the use for which the highway was dedicated is denied; the public are deprived of the readiest means of transportation and the whole street becomes, for all practical purposes, the property of the corporation operating the inner tracks. In the specific case, with the needs of San Francisco admitted; and with the inability of the appellant to meet those needs, the law, according to appellant would put San Francisco in a straight-jacket with its main thoroughfare, and deprive the public of the very rights that it has in the street, and destroy the purposes for which the streets were dedicated and maintained. And if the argument of appellant is car-

ried to its logical conclusion, there could be upon Market street in San Francisco no other organized means of transportation than the United Railroads operating its cars upon its two tracks.

There is no conflict of authority now upon the right of a municipality where a franchise, not exclusive, exists, to grant others of like character for the same streets. This is settled law and the definite rule of conduct of every municipality in the country. If, however, the use of streets, not occupied by a non-exclusive railway franchise, is subject to claims for damages for inconvenience, annoyance, etc., the municipality's right over its streets is a barren one, and a franchise, first, in point of time, confers upon the grantee in fact not only the particular easement but an absolute right to the whole street. It is not difficult to see, if the appellant's rule be correct, that the *deterrence*, which ultimately will result, will be the deterrence of a city from granting other franchises and a *deterrence* to the inhabitants of the municipality in the use of the streets, and finally a *deterrence* of the growth, development, and prosperity of a whole people.

From the time of the Charles River Bridge case until the present there has been no adjudication save one, of which hereafter we will speak, which would, in any degree, justify the amazing rule contended for by plaintiff.

Judge Peckham in an early New York case writes thus upon the subject:

> "The case, then, must turn on the one question, whether the running by the defendants of a track on either side of the plaintiffs' track is such an actual taking of the property of the plaintiffs as cannot be done without compensation; for, although there may be some question whether the crossing of the plaintiffs' track would not be such a taking as would require compensation, yet no such question is raised by the bill and answer on the papers on this motion. There is very little force, I think, in the objection

that it is proposed to lay the defendants' track so near to the plaintiffs' as to injure or practically interfere with their running. The track proposed is the same distance from the plaintiffs' track that the plaintiffs' tracks are from each other, viz. five feet. The interest which the plaintiffs have in Fourth avenue is a right-of-way; their franchise consists in their right to lay and use exclusively a railroad, subject to the duty of running public cars thereon. They have no control or interest whatever in that part of Fourth avenue not occupied by their own road, except that common to the rest of the community, *i. e.*, that it shall be kept free and clear for public use.

"All and any persons have a right to pass along said street. They cannot stop or obstruct it. The crowd of passers may be so great as, in itself, to be an obstruction, yet, so long as it is a moving crowd, whether of individuals or vehicles of any description, it is a legal use of the street. Were the defendants, then, about to run any number of omnibuses, or other ordinary wheeled vehicles, the plaintiffs could not complain. The injury to their own road might be as great or even greater than that which may accrue from the proposed action of the defendants, and yet, so long as their action was not malicious, it cannot be pretended that the plaintiff would have a right to complain.

"This shows that the consequence of which the plaintiffs complain, *i. e.*, difficulty of access to their cars, may exist, and the plaintiffs have no cause of action; in other words, the fact may exist, and be no wrong. Can it, then, be claimed, that that, which, if caused by one means, is not wrong, becomes a wrong on being effected by another means?

"The use of the city street by a railroad for running public cars, has been decided to be a public use, the exclusive right to the track being controlled by the public right to the cars, that being, as the running of the defendant's cars would be, but an exercise by the public of the public right-of-way. The cars will not run, unless in obedience to the public wants, for, otherwise, they would not pay. Should they do so, for the mere sake of malicious annoyance to the plaintiffs, other questions would arise. If, then, after the running of the plaintiffs' road, the public retained a

right to the use of the rest of the street, as a public street, and for public use, and if this proposed use by the defendants be, as has been decided, a public use, the plaintiffs have suffered no infringement of their rights or property, and the injunction must be dissolved, with $10 costs."

The New York and Harlem Railroad Company *vs.* The Forty-Second Street, etc., Railroad Company, 50 Barb., 285.

Can there be any doubt that the rule applicable to the New York case and the case at bar is fairly and accurately stated by Judge Peckham? Is it not true, paraphrasing the learned Judge's language, that the interest of the United Railroads on Market street is a right-of-way, and the United Railroads has no control or interest whatever in that part of Market street not occupied by its own road, except that common to the rest of the community, *i. e.*, that it shall be kept free and clear for public use? Can it be denied that after the United Railroads run their cars the public retain the right to the rest of Market street as a public street and for public use, and if the public propose thus to use the remainder of Market street the United Railroads have suffered no infringement of their rights or property?

A very interesting case, in which, it is true, the question was one of crossing but involving the use of the street, as well, is The Kansas City, St. Joseph & Council Bluffs Railroad Company *vs.* The St. Joseph Terminal Railroad Company, Appellant, 97 Mo., 457.

The testimony, as indicated at page 465, apparently was that plaintiff would be damaged by impeding and delaying its trains in crossing Fourth street. The Constitution of Missouri provides:

"That private property shall not be taken or damaged without compensation, and such compensation must be ascertained and paid to the owner, or into court for the owner, before the property shall be disturbed, or the proprietary rights of the owner therein divested."

The question for determination was thus stated by the court:

> "The general question to be determined is, will the carrying into execution of this purpose of laying its track in said street in the manner stated and operating its cars thereupon in the transaction of its business as a common carrier, *damage the private property* of the plaintiff? There is no question of the appropriation of such property in the case, for although the plaintiff is the owner in fee of the two blocks abutting on each side of Fourth street at the point of crossing, with all the appurtenances thereto belonging, is the owner in fee of the soil over which said street is located subject only to such a public easement as the city acquired by virtue of the decree recited, and of the tracks located across said street, it is not suggested that the defendant's operations will disturb, or for that matter damage, any of this corporeal property. The damage, if any, must be to some incorporeal private property of the plaintiff, and it is claimed that the plaintiff has, if we apprehend correctly, the argument of counsel, two of such items of property that will be damaged by the construction and operation of the defendant's road across its tracks: first, the easement which it has in said street as an abutting proprietor, and second, the easement which was reserved to it, in the decree in the condemnation proceeding."

The opinion then proceeds:

> "As to the first of these rights, it may be said, if by virtue of that decree, Fourth street, as located across plaintiff's property, became a public street in the usual and ordinary acceptance of the term, and as used in the statute, then the plaintiff's easement therein as abutting proprietor can in no way be damaged by the construction of defendant's road, since during its construction it is not proposed to disturb plaintiff's pass-way, and afterwards it will have the same free and unobstructed use of the street as it had before, by the same vehicles drawn upon the same tracks; and every one that desires will have the same unobstructed ingress to, and egress from the plain-

tiff's abutting premises that they have had before. The only damage that can be conceived of, or that is suggested to such easement must flow from the operation by the defendant of its track in the street in its business and the delay plaintiff's trains at times will be subjected to in crossing the stree. by reason of the occupation in the street by defendant's trains of the same space at which it desires to and can alone cross with its trains. But that space being in a public street, the defendant's tracks having been authorized to be laid by the city, its use by the defendant for the purposes of passing to and fro over it with its trains is a legitimate use belonging to the defendant company, as well as to the plaintiff, in common with every other citizen desirous of passing over it with his vehicles. The damage caused by such delay is of the same character as that suffered by every traveler on a public highway whose movements are retarded by those of another traveler on the same highway, is not peculiar to an abutting proprietor although by reason thereof he may more frequently have use for, and be more frequently delayed in his movements in the street than other citizens. The damage resulting from such delay and inconvenience is not the subject of compensation within the meaning of Article 2, section 21, of the constitution.

"This brings us to the consideration of the particular and controlling question in the case, and that is, has the plaintiff company, by virtue of the decree entered in the condemnation proceedings, a private property in that part of Fourth street which runs through its premises, other than the fee in the soil, and the tracks which are located thereon; upon which we have seen the defendant company proposes to impose only such servitude as they are subject to in a public street, which would be damaged by the operation of the defendant's proposed railroad tracks. In other words, has the plaintiff a right of pass-way in that street private and peculiar to itself, not shared by the general public? If so, then it has private property that may be damaged by the operation of defendant's track. If, on the other hand, it has only a right of passway in the street in common with every other citizen, then it has no private property to be

damaged by the exercise by the defendant of its common right of pass-way conferred upon it by the laws of the State and the ordinance of the city.

The court indulges in a brief discussion of the terms of a decree upon which the title of plaintiff rests, and then says:

"If the proceeding had culminated in a judgment of condemnation *in invitum*, in the usual and ordinary way, and at the same time or thereafter the city had given permission by ordinance to the plaintiff to lay down its tracks in the street for the purposes of business and thereafter had given like permission to the defendant company, there could be no question that the rights of each would be equal and co-ordinate in the use of the street, and that the rights of both would be co-ordinate only with the equal right of every other citizen to the use of the street as a public highway, and there would be no question in the case, and no case."

The opinion concludes thus:

"It is clear, we think, that the plaintiff has no right of pass-way either along or across Fourth street that is private property; that as to such right of pass-way it stands in exactly the same situation as the defendant does, or any other railroad company would which obtains permission from the city authorities to lay down its tracks in that street. As the defendant company has under the law, and the ordinance of the city, the right to lay down its tracks on Fourth street, and to cross the tracks of the plaintiff, first having made compensation for any private property belonging to plaintiff that it may be necessary to take or damage in so doing, and it appearing that no private property of the plaintiff will be appropriated or damaged by the defendant in the construction of its railway in said street, in the manner in which they propose to construct it or by the operation of its trains thereon, and that the only damage plaintiff can necessarily suffer by reason of the construction and

operation by the defendant of its tracks on said street, will result solely from the occupation by the defendant at times for its passing trains, of a space in said public highway, needed at the same time by plaintiff for its passing trains, a damage not private, but common to all the public who may have occasion to use the street, occasioned by a public service to which said street is legitimately subject, and for which the plaintiff is not entitled to compensation, we see no reason why the defendant should be restrained from laying down its tracks as it proposed to do in accordance with the permission of the authorities of the city of St. Joseph in said street."

May we not paraphrase the language of this decision? The only damage the United Railroads can necessarily suffer by the construction and operation of the city's street railway will result solely from the occupation by the city at times for its passing cars, of a space in the public highway, needed at the same time by plaintiff for its passing cars, and this damage is not private, but common to all the public who have occasion to use Market street, occasioned by a public service to which Market street is legitimately subject, and for which the United Railroads is not entitled to compensation.

A later case from Missouri which upon its facts is not dissimilar from the case at bar is the St. Louis Transfer Ry. Co. *vs.* The St. Louis Merchants Bridge Ry. Co., 111 Mo., 666.

In this case the plaintiff railroad was operating a double track railroad line within the city. Defendant railroad subsequently was authorized to construct a double track railway upon some of the streets occupied by plaintiff. The street subjected to the use of both companies was 100 feet wide, but without pavements or sidewalks, and situated, apparently, in the industrial part of Saint Louis. A temporary injunction was granted the plaintiff restraining the defendant from constructing its railway upon the street oc-

cupied by plaintiff's tracks. This injunction was on the trial of the merits dissolved.

The court say:

> "The evidence tended to show that the width of Hall street (one hundred feet) was amply sufficient for the construction and operation of both lines of railroad upon it as provided for in the ordinances, according to either of the plans proposed; that the only interference in the operation of either would be the necessary delay in the movements of its trains or cars at the crossings when that space should at the time be occupied by the trains or cars of the other moving over the same crossing:
>
> "From the evidence of the business now being done on plaintiff's road in the street and the immediate use the defendant proposes to make of the street for its business, it is apparent that the business of both can be conducted on the street for the purposes for which they were created without serious injury to the interests of either; and while it is true that these delays in the operation of plaintiff's road will be increased and the difficulties and dangers attendant upon such operation enhanced as the business of each road in the street increases, yet it is far from appearing that the legitimate operation of both would ever become impracticable under such reasonable rules and regulations as self-interest would dictate that each should observe in moving its trains and cars, and that might be prescribed by the city in the exercise of its legitimate power to regulate the use of its streets. And while the value of plaintiff's franchise will be depreciated to the extent of the inconvenience and delay occasioned by such crossings as the result of a healthy competition with it by the defendant's road for a class of business necessary to be done for the public good, which alone affords a reasonable pretext for the existence of either road in the streets of the city. Such depreciation is *damnum absque injuria*, since the city could not grant the plaintiff an exclusive right to the use of the street for its business. *Railroad vs. Railroad*, 97 Mo., 457. On account of such depreciation plaintiff cannot complain, since its own grant was dependent on the condition

> that its tracks should be so constructed and operated as not to interfere with the public use of the street; such being the character of the use to which defendant proposes alone to subject it."

We pause to suggest that upon six blocks of Market street, at the present time, as has already been said, the United Railroads and the city are operating their two distinct lines. It is true this is by virtue of an agreement, but it may be assumed that under regulations which the prudence of each would dictate, and under legitimate orders of the municipal authorities, both lines are operated with a minimum of inconvenience to either. As observed in the case from which we have just quoted, it is true there may be delays, which will be increased in the operation of plaintiff's road, and difficulties and dangers attendant upon such operation; yet the operation of both roads, it is demonstrated, is not impracticable under such reasonable rules as self-interest has dictated and such regulations as might be prescribed by the city for the use of its streets. It may be true, paraphrasing the language of the Missouri Supreme Court, that franchises of the United Railroads would depreciate to the extent of the inconvenience and delay occasioned, but such depreciation is *damnum absque injuria*. The United Railroads cannot complain of such depreciation, because its own grant was dependent on the condition that its tracks should be constructed and operated so as not to interfere with the public use of the street, and the city proposes, by its additional tracks, to subject the street to this character of use and this alone.

The Supreme Court of Missouri states the position of the plaintiff from which it dissents, and adds:

> "The assembly, knowing the condition of the street, and the public use to which it was subjected by plaintiff with its assent, proposed in unmistakable terms to subject the street to another public use of a similar character by the defendant; in doing so, however, it did not propose to deprive the plaintiff

corporation of the use by it of the street, to which the assembly had theretofore assented, which use was subject to the right of every other citizen and of every railroad company having the assent of the city authorities to cross its tracks in the legitimate pursuit of their business."

The opinion concludes:

"The privilege which a railroad company acquires by the assent of the city authorities that its tracks may be laid down and operated in the streets of the city can never be more than a qualified right to the use of the street as a public highway in common with every other citizen, and as no one assembly can by giving its assent to one company limit the power of a subsequent assembly to give a like assent to another, the right is further restricted to the use of the street as a highway in common with any other railroad company acquiring a similar right in the same street by the assent of the city authorities. For convenience this privilege may be, and, in common parlance, is called a right of way, but it is far from being an absolute and unconditional one, such as admits of no obstruction by crossing or otherwise without consent, and is always burdened by the right which every railroad has to cross the tracks of another imposed by statute law. It was this privilege, this qualified right of way of plaintiff in Hall street which was not to be interfered with, and which will not be interfered with, within the meaning of the ordinance by the defendant in laying down its tracks and operating them as it proposes to do upon territory in said street not occupied by the tracks of the plaintiff already, or which it has a right by ordinance to occupy for that purpose, whenever in the future it may have occasion so to do.

"The right to cross plaintiff's tracks in the street is derived not from the ordinance giving assent, but from the general law of the land, and is the only interference to which plaintiff will be subjected."

It is most earnestly submitted that upon both reason and authority the plaintiff's property is neither taken nor dam-

aged, within the meaning of the law or the State or Federal Constitutions.

II.

The Omaha Horse Railway Company vs. Cable Tramway Company, 30 Fed., 332; 32 Fed., 727.

Appellant's reliance for a reversal of the judgment here is this case. It is obvious from its brief that upon this authority is builded appellant's hope of success. It is the one case which lends color to its view and comfort to its cause. And while all of the other adjudications unerringly point one way, appellant apparently deems this single case sufficient to justify its position. The case was decided in 1887 by a very learned judge. The examination of the two opinions rendered enables us fortunately to understand the judge's view of the law and exactly what led to his conclusions. It may be remarked at the commencement of any discussion of these opinions that they were rendered at a time when street-railway law had not approached its present clarity nor certainty. The facts dealt with a franchise for a horse railway in the city of Omaha and a subsequent franchise for what the judge evidently regarded as a new mode of street transportation—a cable tramway. The two were regarded apparently as wholly dissimilar modes of street travel and transportation, as presenting against the old-established and plodding horse car the new and novel, and as yet but little developed, cable road. The decision seemed to have been influenced in some degree by the differentiation in the learned judge's mind concerning these two modes of travel. Apparently too, it was the first instance which had been brought to the attention of the court of street railroads parallel to others in cities—that which is so common today; and that which is now recognized by universal authority was then novel and uncommon. The opinion as found in the case, when first reported in 30 Fed., holds the plaintiff not

to be entitled to compensation for any injury which might result from competition, and then the court proceeds:

> "But there are at least two matters which are clearly proper matters of consideration in estimating the plaintiff's damages: First, the inconvenience and annoyance which results from the crossing of plaintiff's tracks by the track of the defendant; second, the interruption of access to plaintiff's cars by the track and cars of defendant between its track and the sidewalk."

The court therefore reached the conclusion that there were two elements of damage for which plaintiff should be compensated: crossing and interruption of access. It may be observed that ultimately no damages were allowed under the first classification. But it is respectfully submitted that the foundation—the basic principle—upon which a right to damages in both cases must rest is the same. It is in reality inconvenience and annoyance and interruption of access at crossings and where the lines parallel each other. The same elements constitute the damage in each. Logically there can be no difference in the reason for allowing damage for annoyance at crossings and that for allowing damage for annoyance or inaccessibility at other points because of the juxtaposition of tracks. It is pecuniary loss which the court determines may be suffered and for which the plaintiff was entitled to compensation. It matters not that this pecuniary loss arises from the necessary stoppage at a crossing of plaintiff's cars, caused by the passage of defendant's cars, or that the near approach of one to the other at the crossing would deter passengers for a brief period from entering, or deter them altogether in some instances, or whether the damage arises from a car upon a parallel track or running upon a parallel track which will halt the onrush of passengers to the track beyond or deter some from going to the further track. The reason for the loss and the damage is identical. Legally it cannot be distinguished. We repeat it, it is after all inconvenience and annoyance—the stoppage of the travel—to the

plaintiff's cars for a brief period; or, in some instances, deterrence of passengers, but after all the inconvenience and annoyance and deterrence arising from like causes. That which is designated by the court the first matter of consideration in estimating plaintiff's damage—the inconvenience and annoyance resulting from crossing of plaintiff's tracks by the track of defendant—is now so conclusively settled by uniform authority it is no longer debatable. Today, under the general rule, no plaintiff would be heard in a court of equity asking for damages for the mere, ordinary crossing of its street railway by a rival. Some of the authorities upon this subject have been quoted in the first part of this brief.

Nellis, on Street Railways, Vol. I, page 254, Sec. 108.
Am. and Eng. Enc. of Law, 2d Ed., Vol. 27, page 24.
Lewis, on Eminent Domain, Vol. II, 3d Ed., Sec. 424, page 768.
Consolidated Traction Company *vs.* South Orange and Maplewood Traction Company, 56 N. J., Eq. 569.
Market Street Railway Company *vs.* The Central Railway Company, 51 Cal., 583.

"The construction and operation of a street railway is, as we have elsewhere seen, a proper public use of the street and not an additional burden thereon; and when a street railway is constructed across a steam railroad which intersects the route of the street railway, the steam or commercial railroad company cannot claim compensation from the street railway company as for an additional burden, because the rights of the steam railroad in the street are subject to all proper street uses, among which is the use of the street for street railway purposes. And the same principles apply when the tracks of one street railway are laid across the tracks of another street railway at intersecting points."

3 Dillon Mun. Corp., 5th Ed., sec. 1241, page 1983.

If the rights of the railroad in the street are subject to all proper street uses, among which is the use of the street for

street railway purposes, does it not seem plain that the inconvenience or the expense or the discomfort or the alleged "inaccessibility" which may be the natural result of the legitimate use of the street by the operation of a street railway are not proper subjects of legal cognizance and for them damages cannot be allowed?

The opinion of the court in the Omaha case we respectfully submit did not sufficiently consider the prime purpose of streets, the paramount rights of the public nor the status of street railroads legally and legitimately operating. If the conclusions of this opinion be correct, there cannot really be two street railroads upon the same street. A most slender grant, without authority or intent to confer exclusive rights, would preclude any other grant upon the same street. When the amount of damage which might be recovered in thickly populated territory, under circumstances such as are disclosed by the Omaha case is considered, the decision in that case is tantamount to holding that but one grant to one street railway may be made by any municipality, no matter what the urge or necessity.

The owner of the fee, it will be admitted, is not entitled to damages. The rule enunciated in the Omaha case could only work incalculable harm to growing municipalities. New rights, new privileges, additional emoluments, by a simple franchise, are accorded. A city is precluded from the performance of its very fundamental function by another contract or another franchise or by exercising its own sovereign power. Communities will be placed in straight-jackets, from which they cannot emerge except upon payment of exaggerated sums. The public welfare is denied. Such consequences the law never intended, and against such consequences the very essence of logic and law rebels.

The rule respecting crossings is very plainly stated in *Chicago, etc., Railway Company vs. Chicago Street Railway Company*, 47 Am. State Reports, 264:

> "The use of the street by the appellant is subject to the easement in the public and the burden of keep-

ing the street crossing over its tracks in such a condition as not to impede or obstruct the public easement and use of the street by the public generally is a burden already resting on the appellant. That burden is in no way to be added to or increased by the crossings appellee proposes to construct. So long, therefore, as it is a settled law of this State that a street railway is not an additional burden to that of the easement which the general public has in the street and that the street railway company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. * * * Appellant contends that this will be a burden and a hindrance to the free and obstructed use of the appellant's steam railway which, it is claimed, is a taking of private property without just compensation in violation of the Constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway but, having obtained its right of way subject to the burden of the easement in the public generally and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights obtained in the use of the streets for its steam railway were subject to the burden of the appellee's use thereof in the ordinary and proper manner for its street railway. The complaint shows that appellee was only proposing to use the streets at the crossings in the ordinary and in a proper manner for the construction of street railway crossings and that it had been hindered and obstructed therein by the appellant in the use of force. It would therefore not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right-of-way over and across the streets named, free from the burden of the public easement, a part of which belongs to the appellee—the street railway."

Compare the language of the Omaha case in 32 Fed.:

> "A railroad track with passing cars between plaintiff's track and the sidewalk, the ordinary passageway of foot passengers, impairs more or less access to plaintiff's cars. It is a direct hindrance and injury to accessibility thereto. Why should this hindrance and injury be not a legitimate element of damages upon the same principle that controls in the illustration cited?"

The reason is that stated in the Indiana case cited: Because the plaintiff obtained its right of way subject to the burden of the easement in the public generally and the new street railway is entitled to the use of that easement and the appellant's rights were subject to the right of the new street railway to use the street.

No private property is taken without just compensation, because it was not proposed in the Omaha case nor is it proposed in this case to take from plaintiff anything it ever owned. The hindrance and the injury referred to in the Omaha case cannot be a legitimate element of damage because plaintiff there never owned its right of way over and across the streets free from the burden of the public easement, part of which belonged to the other street railway. The reasoning in the Indiana case is conclusive. Its logic is unanswerable. It announces the rule about which now there is no doubt.

Another case, in which one of the leading cases cited by appellant here is clearly distinguished (Ga. Midland & G. R. Co. *vs.* Columbus & Southern Ry. Co., 15 S. E., 305) which succinctly states the rule, is *Southern Railway Company vs. Atlanta Railway & Power Co.*, 36 *S. E. Reporter*, 873:

> "But in the present case we fail to see that the defendants have invaded or were seeking to invade any legal right of plaintiff. As above indicated, when the plaintiff was permitted to construct its track across an existing street or public road, it did so subject to the condition that it must submit to the in-

creased inconvenience which might result from the growth and development of the city or country and the consequent increase of travel in the usual methods along such street or road. It acquired only an easement; that is, a privilege of crossing this street and road in the transportation of its freight and passengers. It may be that the crossings of defendant's tracks over this street and highway would cause inconvenience to the plaintiff, but as we have above demonstrated, this use thereof by the defendants, instead of constituting any burden or servitude upon them is intended for the convenience and benefit of the traveling public on these streets. The question as to whether or not their construction was necessary and important in order to accomplish such a purpose has been passed upon by tribunals constituted by law to decide such issues. There is nothing in the record to show any abuse whatever of the exercise of that power. When plaintiff therefore obtained its license to cross these highways, it necessarily took the same subject to any increased inconvenience which might arise by reason of the demand or want of the public for greater facilities for traveling. We are at a loss therefore to see how any legal right of property of the plaintiff will be invaded or in any wise affected by the exercise of the rights and franchises which the street railway companies are attempting to use in the present instance. It follows from the above that no legal right of plaintiff has been encroached upon and none of its property has either been taken or threatened to be taken or damaged in contemplation of law."

And it is for exactly the reason that the plaintiff in the Omaha case and the appellant here took their easements subject to any increased inconvenience which might arise by reason of the demands or wants of the public for greater facilities for traveling that neither was entitled to recover for what, in the Omaha case, is designated inconvenience and annoyance and interruption of access. Reason and authority alike demonstrate that the elements of damage allowed in

the Omaha case constituted in reality neither a taking nor a damaging of property within the constitutional inhibition.

See also

N. Y. & H. R. R. Co. *vs.* 42d St. R. R. Co., 50 Barb., 285.

Kansas City, etc., Co. *vs.* Council Bluffs, etc., R. R. Co., 97 Mo., 457.

St. Louis Ry. Co. *vs.* St. Louis, etc., Ry. Co., 111 Mo., 666.

There is within the very opinion itself the evidence that the conclusions were reached from a wholly erroneous premise. The learned judge in justifying his conclusions in the *32 Fed.* says:

> "Take this illustration: A railroad company condemns a right of way through a farm; the value of the strip of land thus taken is always awarded as damages; so also the injury which results to the balance of the farm by reason of the appropriation of the strip taken to the contemplated use; and in this injury is considered the difficulty of passage, the impairment of free access between one part of the farm and the other. The presence of the railroad track, with its moving trains through the middle of a farm, causes both risk and inconvenience in passing from one part of the farm to the other. And this inaccessibility, as we may call it, forms one element of damages."

Another illustration of a similar nature:

> "Suppose the owner of a lot in the city builds a store in the rear of that lot, leaving vacant ground between it and the street. If a railroad company condemns a right of way over his vacant ground in front of his store, thus interfering with freedom of access from the street, the same rule in estimating damages would apply and the inaccessibility would be declared a proper subject for compensation. ***This principle controls the case at bar.***"

The illustrations properly state the law in the specific instances suggested. The principle of these illustrations, however, does not control the case at bar and cannot be the rule. From the erroneous premise that the principle which governs abutting owners controls in the Omaha case, the conclusion of the judge naturally followed, but the principle which controlled in the Omaha case was not and could not be that the plaintiff railway company owned the street, that it had an absolute property in portions of the street not granted to it, and that it could for itself direct therefore the uses to which the public street could be put.

The rights of an abutting owner whose land is cut off by a railroad company are vastly different from the rights of a street railway company in the remaining portions of the street not covered by its tracks.

The principle which should have obtained in the Omaha case is that laid down in the New York and Missouri cases above quoted. The horse railway in the Omaha case took its right of way subject to the burden of the easement in the public generally; the cable tramway was entitled to the use of that easement and the right of the horse railway in the parts of the street not covered by its franchise were subject to the right of the cable railway to use those portions.

The cases cited by counsel for complainant in addition to the Omaha case do not support their contention that property of complainant is damaged contra to the constitutional guaranty.

Before discussing these cases in detail we desire to again advert to the fundamental rule of law governing the character of complainant's franchise. This rule cannot be lost sight of in determining the application of those cases to the case at bar.

Heretofore we have cited numerous cases, of which the Knoxville case is the leading one, showing that it is now the

firmly established rule that where a water company has been given a franchise to supply a municipality with water, unless it is unequivocally and expressly stated in the contract itself that the municipality will not thereafter engage in the business of furnishing water to its inhabitants, the city is not precluded therefrom. These cases were cited upon the proposition that complainant's franchise did not exclude the municipality.

Is the investment of a railroad corporation entitled to greater protection under constitutional guarantees than that of a water company? Is the franchise of a railroad corporation to be measured by different rules than that of a water company? Is the contract of a railroad corporation more sacred in the eyes of the law than the contract of a water company? Is the right and duty of a municipality to furnish its inhabitants with water different in legal character than its right and duty to furnish transportation? If the answer to these questions must be in the affirmative, it must be given with the admission that constitutional guarantees are for the favored few and not for all; that the rights and powers of municipalities can be exercised in opposition to the private interest of all but the favored few; and on reaching the threshold of the latter interest the exercise of those powers and duties must halt. The mere statement of the proposition carries its own refutation.

It is not difficult to see why controversies of the character involved in this action have not risen heretofore. For many years it has been the policy of municipalities that, although private interests were supplying water, the cities themselves have taken over in whole or in part the duty toward the inhabitants; and though private investment and private interest might become seriously affected, or even destroyed, unless a city had unequivocally and expressly prevented itself from performing this duty, the courts have not restrained the city from so doing.

It is only in recent years, and then only in few instances, that any city has undertaken the great problem of transporta-

tion within its limits, and, whether we agree with the principle or not, we cannot shut our eyes to the fact that public opinion and public interest require that cities undertake this obligation to their people in greater degree than they have heretofore.

At this point we desire to cite to the court two additional authorities upon the proposition that unless a franchise unequivocally and expressly contains the provision that the city shall not undertake the business of supplying its inhabitants with water, a franchise to a private company will not preclude the city from so doing. The cases referred to are:

Mayor, etc., of the City of Meridian *vs.* Farmers' Loan and Trust Co., 143 Fed., 67.

Water, Light, and Gas Co., of Hutchinson, Appt., *vs.* City of Hutchinson, *et al.*, 207 U. S., 385; 52 L. Ed., 257.

In the first case the Water Company was incorporated by a special act of the legislature of Mississippi to furnish all water demanded to the inhabitants of the City of Meridian. Subsequent to that special act, the charter of Meridian was amended so as to permit the city to enter into a contract with any person or company to furnish water to the inhabitants of Meridian and for all municipal needs. Thereafter, the city of Meridian solicited propositions to build water works and to furnish the city with all necessary water. In response to the city's solicitations, W. S. Kuhn offered to build water works and to furnish water to the City of Meridian for all its needs. A contract was entered into with Kuhn by which a system of water works was specifically set forth, prescribing the mileage of the distributing system and the character of machinery, with the proviso that these should be increased from time to time to meet the demands of the city. The contract was to continue for a period of twenty-five years unless the same should be terminated by purchase, and the grantee was required to continuously furnish water, not only to the inhabitants of the city, but for all municipal needs during

the term of the franchise. The proviso of the contract for the termination thereof by purchase was that the city could at any time take over the water works by payment to the grantee of the full value thereof to be fixed by arbitrators. The contract further permitted the mortgage of the water works, franchises, and rentals. Prior to the time the city decided to build water works of its own, the city desired to take over the water works of the company, but being dissatisfied with the award of the arbitrators, declined to do so. Thereafter the city undertook to build waterworks of its own, and for that purpose voted bonds. It was claimed that this action of the city not only impaired the obligations of the grantee's franchise, but also violated the provisions of the constitution that property should not be taken without due compensation. The court says:

> "The contract here is one in which a municipal corporation makes a grant in which the public has an interest. When a municipal corporation is exercising its functions for the public good, it is not to be shorn of its rights to continue to exert its power for the general good by mere implication. If by contract it may under the circumstances restrict the exercise of its public powers, the intention to do so must be shown by apt words so clear as not to reasonably permit any other construction."

The court therefore declined to interfere with the city's proposal to build waterworks of its own.

The case of the Water, Light, and Gas Co., etc., *vs.* the City of Hutchison, *supra*, is a case in which the same principle is laid down. The facts of that case are as strong in favor of the company as those in Mayor, etc., against the Farmers' Loan and Trust Co., et al.

We say, therefore, that if the principle enunciated by the courts over and over again in litigation between water companies and municipalities is to be applied to this case, unless, forsooth, the rights of a railroad corporation are more sacred than those of a water company, the conclusion is irresistible that the franchise of the plaintiff in this case is

not exclusive. However, if the argument of complainant's counsel is to be followed to its logical conclusion, although the city did not grant to the United Railroads a franchise to exclude the city from thereafter furnishing to its inhabitants transportation, the franchise, nevertheless, is exclusive, because, by the doing of the very thing which the franchise of complainant's corporation, as a matter of law, permits the city to do, it lessens in some degree, the opportunity of complainant to enjoy its franchise as it did before the city constructed its own railroads.

A municipality has the power as against the franchise of a water company, to furnish water to its own inhabitants, and thereby greatly, if not wholly, destroy the investment of a water company, and this, because the franchise did not exclude the city. But the city, with the same character of franchise granted to a railway corporation, counsel would say, can not undertake that which the non-exclusiveness of the franchise of the railway corporation permits the city to do, viz: furnish transportation to its inhabitants, because it will interfere in greater or lesser degree with the physical operation of the company's roads and cause inconvenience to passengers desiring to take the company's cars, resulting, in some instances, in loss of patronage to the company. We assert that this distinction is not supported in reason or sound law.

The principles upon which complainant draws to establish its proposition, as we have already stated, are those applied in cases involving the rights of abutting property owners and where the actual portion of the street occupied by a prior company is attempted to be invaded by a later company. On pages 23 to 77 of complainant's brief numerous cases of the character just described are cited and referred to by counsel. By a careful culling of sentences and phrases from those decisions they have ingeniously woven excerpts apparently establishing principles in support of their contention. It is unfortunate that counsel in citing these cases have refrained from citing the facts of the par-

ticular cases in which they were found. If they did it would at once become obvious to the court without recourse to the books that the courts were dealing in these cases with subject matters entirely different from this case, and as to which fundamental principles of the law can now be said to be fairly well settled. Time will not permit us to analyze the facts and subject matter of each case cited by counsel. We stand upon this proposition that with the exception of the Omaha case those excerpts are taken from cases of the character above described. Three examples will suffice.

Counsel have frequently referred to the case of Hamilton Traction Co. *vs.* Hamilton Transit Co., 69, Ohio State 492, 69 N. E., 991-994. Excerpts therefrom are found on pages 27, 37, and 45 of complainant's brief. An examination of that decision, and particularly the map showing the proposed construction of the tracks of the two companies, found on page 992, 69 N. E. Reporter, shows that the second company attempted to construct its tracks in the same space in the street occupied by the tracks of the first company. The doctrine announced in that case is found in the language of the court itself:

> "The right which the grantee acquired by such grant (that is the grant to construct and operate a street railroad on a street) is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public; and where, as is this case, there are conflicting claims asserted by rival companies each claiming the same location under grant from the city authorities, and for the same character of use, such claims, even were both grants authorized, should be settled and determined by applying the rule that the first of said grantees to rightfully occupy the street has the superior and better claim to right thereto."

Nothing can be found in the case to justify the assertion that if the second company had not sought to invade the same portion of the street occupied by the first one, but used other portions of the street, the same rule would have been applied. On the contrary the opposite clearly appears, the franchise was not exclusive and it was the invasion of the same portion of the street which made the acts of the second company unlawful.

On page 64 of complainant's brief, counsel cite the case of Pittsburgh, Virginia, and Charleston Railway Co. *vs.* Vance 115 Pa., 325, 18 Atl., 764, and by selecting one paragraph from the opinion, claim support from that case for their contention. The facts of that case were these. The railroad company condemned a right of way over a farm of ninety acres upon which in addition to the farm building, a mill was situated and operated by the owner. Evidence was introduced showing that access to the mill was therefore greatly hindered, and passage thereto and therefrom rendered dangerous, resulting in loss of patronage. The court, when using the language found in complainant's brief, was discussing the admissibility of that evidence. In the sentence following the excerpt quoted in complainant's brief this language is used:

> "But the testimony was relevant *only* as it might tend to show that the loss of custom detracts from the *value of the land and to what extent*, for if the plaintiff might recover for the loss of custom as a *specific item* of claim, he might under certain condition, recover beyond the value of the land, and this would be at variance with all the cases."

The court was dealing with a principle well established in the law of eminent domain, that when property is taken not only must the owner be compensated for the land actually taken but also the damage done to the remaining portion by the severance and the inaccessibility produced by the use of the condemnor of the part condemned.

Again on page 62 of their brief, counsel refer to Vincent Brothers *vs.* New York R. Co. (1904) 77 Conn., 431; 59 Atl., 491, and quote a single sentence therefrom in support of their theory. In that case, a steam road, required to change the grade of its tracks by legal authority, closed the street on which Vincent Brothers were engaged in the business of selling grain, constructed temporary railroad tracks almost against the property of plaintiff, and operated a steam railroad thereon. The action was to recover damages caused by the interruption of access to plaintiff's building and loss of profits and trade to which they unquestionably were entitled. The distinction between that case and the case at bar is at once apparent.

The courts, in the foregoing cases and the other cases with the exception of the Omaha case, were dealing with two distinct states of facts entirely different from the situation in the case at bar:

First. An injury to an abutting property owner by a steam railroad cutting off access to his business and property, either by the construction or operation of the road in a public street:

Second. The damage done to the remainder of a tract of land through the condemnation of a part of the tract not only by depreciating the value of the remainder by reason of the severance but also by reason of the use to which the condemned portion is to be put.

Third. The interference caused by one railroad occupying the same space in the street actually occupied by another road.

The law is well settled, which we have heretofore demonstrated, that an abutting property owner has no right to complain of the use of a public street for street railroad purposes. This is said to be an ordinary use of the street and not inconsistent with the purposes for which streets are laid out. This, however, is not the rule where a steam railroad seeks to use the public street. Such use is not an ordinary use, and abutting property owners have the right to com-

plain. Unquestionably the construction on Market street of the tracks of the United Railroads causes interference, more or less, with access to and from business property on the street. The construction by the municipal authorities of additional tracks on the street unquestionably causes a greater degree of inconvenience to such access to abutting property. But property owners under the firmly established rules of law cannot complain, and they are not entitled to damages.

Assume, as is the fact, that on the south side of Market street there is a large department store known as "The Emporium" which draws patrons and customers from all over San Francisco.

Were there no street railroads at all upon Market Street, access to and from the Emporium would be more convenient and easy than if there was one. If there were two railroads upon Market Street, access to and from the Emporium would be less convenient than if there was one. And the very construction of two additional tracks on Market Street might even deter timid people from patronizing this particular store. Although the owners of that property have a peculiar interest in the street, and the great value of their property depends upon the fact that it abuts upon this important street, nevertheless they are not entitled to damages because of this inconvenience of access to their property. Why, therefore, should the law be more tender of a private company which has been granted a privilege that it could not possess except by permission of the city, to operate a street railroad for the public convenience, than it is of a property owner whose property abuts upon the street, and in which he has an inherent and vested right by virtue of that very ownership? It is submitted that if any difference exists between these two respective rights, it should be to confer upon abutting property owners greater protection against interference with their access to and from their property than to railroad companies against interference with access to and from their cars operated under a franchise.

The rule governing one road occupying the same space occupied by another road seems to us to rest upon clear legal foundation and is entirely logical. The company is granted the right to operate its cars in a particular portion of the street. Here is a direct physical invasion of the easement of the railroad company, and it is for this reason that the courts have protected the prior company from a subsequent company's utilizing the same space. Reason and logic and the rules of law established in somewhat analagous cases can be brought in support of that doctrine, but the principle cannot be extended to embrace interference with access to cars of a company operating on an inner track which normally and unavoidably occurs from the operating by a competing company of cars on an outer track.

IV.

Appellant's Franchise Was Not Exclusive and Never Became Exclusive Either in Whole or in Part.

A very ingenious argument is sought to be evolved by appellant from section 5 of its franchise and section 499 of the Civil Code of California. While tacitly conceding that the city could not grant an exclusive franchise, and that it did not do so to appellant, the legal fiction is created, because of the law existing in California at the date of the franchise, that appellant acquired something which could not be directly given to it. This something is rather interestingly designated a *pro tanto* franchise, and the pages of the brief of the appellant are sprinkled with "*pro tanto*" until appellant's insistence upon the refrain becomes rather confusing. This partial exclusive franchise, granted in defiance of the powers of the city and in violation of the law of the State, is described by appellant to subsist in the streets described in its charter for the excess over five blocks. It is suggested that this exclusiveness comes from two sources:

First, section 5 of the franchise; and, second, section 499 of the Civil Code. Section 5 but writes into the franchise, and this by specific reference, section 499 of the Civil Code. Of course, by thus incorporating in the franchise a part of the law of the State of California, the rights granted by the franchise are neither diminished nor increased. *The franchise* of appellant is changed neither in character nor extent.

If the scrivener who drew the particular instrument had seen fit to insert in it that it should be lawful for the City of San Francisco to do all things permitted by the laws of the State of California, he could have accomplished no other result than the law itself, unwritten in the specific instrument, accomplishes. Indeed, a more satisfactory explanation for the insertion of section 5 in the franchise would seem to be an intention of the parties to make perfectly clear that they were not dealing with an exclusive franchise.

The power was in the State of California. From its reservoir of power the State conferred upon the city of San Francisco the right to grant franchises. The State did not thus exhaust its reservoir of power. It did not give absolute and complete dominion of streets to the city. It imposed a limitation which Judge De Haven, in *San Jose vs. San Jose*, 156 Fed., 458, says was for the convenience of the public. The State retained full jurisdiction over its limitation, with which it had never parted—did so for the welfare of its people generally. The benefit accruing the appellant takes to itself. The matter, however, embraced in the limitation as set forth in section 499 was one between the State of California and its people—between the State, if you choose so to put it, and its municipalities. It was not in reality a contract between the State and franchise holders. It is true that for the time being, and only for the time being, for the convenience of the public, the State prescribed a limitation upon the use of streets, always retaining its full jurisdiction and authority over this limitation, which remained, reserved in its reservoir of power. The appellant, in common with all others of California, was governed by the State's enactment;

but the appellant, like all others, was governed by the State, and at all times was subject to the State's determination of what was most advantageous for the public welfare.

The position of the appellant has shifted somewhat. In the lower court appellant argued quite as ingeniously and quite as persuasively as here that its contract was with the State of California, and, because of that fact, section 499 had given to appellant what it terms a *pro tanto*, exclusive franchise. The error of the position of appellant is that its franchise today is the same franchise which was given to it in 1879. The *franchise* has not been changed or modified in any degree. The general law of the State, for the convenience of the people, could not be frozen into unchangeable fixidity by the franchise of appellant. The franchise continued exactly the franchise granted. The general-welfare law remained such only so long as the legislature, in its wisdom, believed it ministered to the general good.

Writing section 499 into the franchise, unless done upon the theory suggested of making plain that the parties understood full well that no exclusive franchise could be granted, may be fairly inferred as rather an idle act. Of course, if any rights accrued to the appellant under 499, those rights would be unaffected by the manner in which that section should be written in the franchise. Bearing in mind that section 5 of the franchise states "it shall be lawful" for the city to grant an additional franchise for five blocks, assume that within the ensuing few years after the date of the franchise the legislature of California had seen fit to amend section 499, and changed by the amendment the number of blocks mentioned in that section from five to two. With this later law in force as a general law of the State of California, let us assume that the city of San Francisco undertook, in accordance with section 5 of the franchise of the plaintiff, to grant to another corporation a franchise for five blocks of the streets covered by plaintiff's franchise. Is it possible to imagine the appellant, under such circumstances, asserting that section 5 constituted a

contract between the city and appellant, and therefore appellant, standing upon this contract, recognized the validity and the legality, notwithstanding 499 of the Civil Code forbade it, of a grant of five blocks covered by its franchise? If section 499 were changed so that it read "two blocks" instead of five, could the city of San Francisco, under section 5 of the franchise of plaintiff, grant a franchise for five blocks in the city of San Francisco on streets covered by appellant's franchise?

If we were without judicial determination of the character of Section 499 of the Civil Code of the State of California, we might follow with more patience and greater tolerance the bizarre argument of appellant. But the Supreme Court of the State of California, as stated, in the opinion of Judge Hunt, has construed the Section as a limitation, and the Federal Court presided over by one of the most distinguished of Californians, Judge De Haven, has interpreted it as a statute for the protection of the public from inconvenience. The statute, of course, was regulatory in character. It comes within that extensive category of laws designed to promote the public welfare. It is indeed a police regulation. In the earlier pages of this brief this phase of the case has been discussed and many authorities cited. So numerous have been the adjudications, particularly in late years, of this court that it would be a work of supererogation to deal at length with the general principle or to cite in detail the authorities. The law has been variously stated by text-writers, but ever with increasing favor as the complexities of modern society have multiplied.

It has been said that the power to regulate the use of streets for railway purposes is a persistent power, inherent continuously in the city government and one council cannot, by exercise of the power, deprive succeeding councils of the power to exercise it again when found necessary. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police

power resident in the State as an inalienable attribute of sovereignty. It is well settled that no contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public and this is especially true of the police power, for it is incapable of alienation. Restrictions upon the police power are those only which are to be found in the fundamental law, for the authority of the legislature in the exercise of this prerogative cannot be limited or controlled by the action of a previous legislature or by the provisions of contracts between corporations or individuals. It follows, of course, that corporations take their rights and privileges subject to this general power which permanently resides in the State.

In closing this particular portion of the argument we refer to a few of the decisions of this court: *Wheeling and Belmont Bridge Company vs. Wheeling Bridge Company*, 138 U. S., 287, where it is said:

> "Nor did the charter of the defendant contain any inhibition upon the State to authorize the establishment of another bridge within the distance claimed whenever the public interests should require it. An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions. As was said substantially in the case of *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420, 548, whenever it is alleged that a State has surrendered or suspended its power of improvement and public accommodation on an important line of travel, along which a great number of persons must daily pass, the community has a right to insist that its surrender or suspension shall not be admitted, in a case in which the deliberate purpose of the State to make such surrender or suspension does not appear.

Chicago and Alton R. R. vs. Tranbarger, 238 U. S., 67:

In referring to the duty of a railroad to construct certain necessary improvements, Mr. Justice Pitney, speaking for the court, says:

> "The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no other person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (*Munn vs. Illinois*, 94 U. S., 113, 134; *Hurtado vs. California*, 110 U. S., 516, 532; *Butterfield vs. Stranahan*, 192 U. S., 470, 493; *Martin vs. Pittsburg, &c., R. R.*, 203 U. S., 284, 294); so an immunity from a change of the general rules of law will not ordinarilly be implied as an unexpressed term of an express contract. See *Gross vs. United States Mortgage Co.*, 108 U. S., 477, 488; *Pennsylvania R. R. vs. Miller*, 132 U. S., 73, 83."

And the learned Justice then adds:

> "(3.) But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due-process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property.
>
> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line vs. Goldsboro*, 232 U. S., 548, 558, and cases cited. And it is also settled that the police power embraces

regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & Mich. Southern Ry. vs. Ohio*, 173 U. S., 285, 292; *C. B. & Q. Ry. vs. Drainage Commissioners*, 200 U. S., 561, 592; *Bacon vs. Walker*, 204 U. S., 311, 317."

And again on page 78 it is said:

"And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment. *Chicago, Burlington, &c., R. R. vs. Chicago*, 166 U. S., 226, 255; *New Orleans Gas Co. vs. Drainage Comm.*, 197 U. S., 453, 462; *C., B. & Q. Ry. vs. Drainage Commissioners*, 200 U. S., 561, 591."

In the still later case *Hadacheck vs. Los Angeles*, 239 U. S., 394, Mr. Justice McKenna, delivering the opinion of the court, in reference to the police power, says:

"We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many cases cited by petitioner in which it is decided that the police power of a State cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. Chicago & Alton R. R. *vs.* Tranbarger, 238 U. S., 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."

Let us picture for a moment the mystic maze into which the argument for appellant leads us:

a. Appellant's franchise was exclusive *pro tanto,* it says, but in result practically and wholly exclusive, because of section 499.

b. Appellant's franchise was substantially exclusive because any other railway upon the streets covered by appellant's franchise, and this is so, whether the other railway be a single or double track railway, would embarrass its operation or interfere with access to its cars. Any railway operated on tracks parallel to appellant would of necessity do these very things, therefore none other could be operated.

Appellant has then in the last analysis in reality received by its charter from the city of San Francisco two exclusive franchises, or a franchise two-fold exclusive. And all this has come to appellant notwithstanding the city could not grant an exclusive franchise. The astonishing paradox confronts us, therefore, of a lack of power to grant exclusive franchises which has resulted in a two-fold exclusive franchise.

And this, too, has arisen when the public development and the progress of the city of San Francisco require and demand exactly what the city here seeks to do. This case, according to appellant, therefore presents not what Mr. Justice McKenna describes "that private interests in the way of the march of progress must yield to the good of the community"; but it presents substantive law, the welfare of the people, the development of the city, and modern progress all yielding to unsubstantial interpretation and shadowy implication.

In conclusion, we quote from the opinion of Mr. Chief Justice Taney in the celebrated case of *Charles River Bridge vs. Warren Bridge et al.,* 11 Pet., 420, a case which has stood

as one of the landmarks in the judicial history of this country since it was decided, in 1837:

> "When a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, 'that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations.
>
> * * * * * * *
>
> "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depend on their faithful preservation."

Respectfully submitted,

HIRAM W. JOHNSON,
GEORGE LULL,
City Attorney of San Francisco;
JOHN J. DAILEY,
Ass't City Att'y of San Francisco,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 282.

UNITED RAILROADS OF SAN FRANCISCO, APPELLANT (COMPLAINANT BELOW),

vs.

CITY AND COUNTY OF SAN FRANCISCO ET AL., APPELLEES (DEFENDANTS BELOW).

REPLY OF APPELLEES TO SUPPLEMENTS TO BRIEF FILED BY APPELLANT.

This case was argued orally Tuesday, March 25th. Sunday evening, March 23d, counsel for appellant presented to counsel for appellees a proof of what was designated "A Summary of Local Law Respecting Matters Involved in the Issue Concerning the 'Taking' and 'Damaging' of Property"; on Monday, March 24th, another document, designated an "Outline of Argument for Appellant"; and on Tuesday, the day of the oral argument, certain emendations and corrections of this later "Outline." At the oral argument the appellees were granted by the court seventy-two hours in which to present a response.

The only importance which attaches to the matter which was thus presented by appellant is in its change of theory, quite at variance with its presentation in the court below or in its opening brief, that the law of the State of California concerning street railroads is peculiar unto itself, and that under the decisions of the Supreme Court of California a right of action different from that accorded by other jurisdictions accrues to the appellant against another company maintaining upon the same streets with appellant an additional street railway. This we deny. The authorities cited by appellant do not by any means establish this novel proposition, as a casual examination clearly demonstrates.

Apparently the leading case referred to by appellant is the *Appeal* of *N. B. & M. R. R. Co.*, 32 Cal., 499. This, however, was an assessment and a taxation case, wherein the Board of Supervisors was authorized to widen a certain street and "assess the expense of the work upon the owners and occupants of houses and lands, railroad corporations, and companies that might be benefited thereby." In the course of an extensive discussion as to whether or not a railroad would be benefited, the court uses various expressions indicating that for the purpose of assessment and taxation the property of a railroad company may be regarded as possessing the attributes of certain other kinds of property, but this is all that is decided.

The opinion merely holds—

> "That in those States where no special provision is made for taxing this species of property in a different mode it is assessed as real estate in the same manner and upon the same principles as land,"

and that its estate is subtantially of the

> "same kind and of equal dignity before the law with the estate of an abutting owner."

This does not mean that there is in the State of California a law *sui generis* in relation to the easements of street

railways. It is but the announcement of the rule, which can be found in every State and in every text book, that

> "Estates in franchises are said to rest upon the same principle as estates in land."

Authorities could be multiplied indefinitely in support of this general principle.

Los Angeles Pacific Co. vs. Hubbard, 17 Cal. App., 650, is of like character with the principal case. It involved assessment and taxation to provide cost of a proposed improvement of property located within certain boundaries.

Neither case holds, and of course it is not the law, that the railroad company owns in fee a part of the street. In California, as elsewhere, it has but an easement. That this easement is property, and for the purposes of taxation it may be assessed as an estate in land, may readily be conceded. But it is a far cry from this to the claim that the railway company may assert as against the general or the traveling public, or as against those using legally the remaining portions of the street, an absolute ownership which would enable it to dictate the specific uses of the highway.

California has decided the relative rights of street railway companies and the public in the street, in *Market Street Rwy. Co. vs. Central R. R. Co.*, 51 Cal., 583, and for the convenience of the court we repeat the very brief decision:

> "The maintenance of horse-railroads, and running of cars upon the public streets of the city of San Francisco designed for the carriage of passengers, is a mere specific mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street, nor does it prevent the crossing of its track by another railroad maintained for a similar purpose, provided the crossing is effected with as little damage as may be."

It will be observed that the attorneys for the appellants in that case, page 585, denying the rule, cite to the Su-

preme Court the principal case, the *Appeal* of *N. B.* and *M. R. R.*, 32 Cal., 510,

> "As to the nature of the interest and estate secured to the plaintiff under these franchises,"

and assert:

> "Where lands are already dedicated to a public use they cannot be appropriated to a similar use by a second appropriator."

It is obvious that if under the leading case in the 32 Cal. Reports a street railway company obtained a right of property in the street which, *for all purposes*, is to be considered real estate and the absolute property of the company, the decision in *Market Street R. R. Co. vs. Central R. R. Co.* could not have been rendered.

In a late California case the Supreme Court defined "street railway," and while the definition is not particularly illuminating, it gives to us something of the view of our court of last resort in this respect:

> "Our own court in *Board of Railroad Commissioners vs. Market Street Rwy. Co.*, 132 Cal., 183, quoting with approval the case of *Bloxham vs. Consumers, etc., Co.*, 36 Fla., 539, uses this language: 'The term street railroad applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed, compared with commercial railroads, which carries no freight but only passengers from one part of a thickly populated district to another in a town or city and its suburbs.' "
>
> *Simoneau vs. Pacific Electric Rwy.*, 159 Cal., 499.

And again, our Supreme Court has said:

> "The streets of a muncipality are for the use of the traveling public and the right of a street car com-

> pany is only to use them in common with the public. The fact that a company has been granted a right to lay tracks and operate cars along the streets gives it no exclusive right to travel even over that portion of a street covered by its tracks."
>
> *O'Connor vs. United Railroads,* 168 Cal., 48 (1914).

Again:

> "The dedication of a street to public use authorizes any ordinary use for street purposes, and the use of a street in a city or town for the tracks of a street car company is of this class and is therefore authorized."
>
> *Finch vs. Riverside, etc., Rwy. Co.,* 87 Cal., 598.

We have cited these few cases solely for the purpose of indicating to the court that the rule in California in regard to street railways is no different from that prevailing in the other States of the Union.

The permission to file a response to the new authorities presented by appellant was asked because it was thought possibly in our research certain apt cases had escaped us which appellant at the last moment had discovered and brought to the attention of the court. We have carefully examined every new case thus presented by appellant and we have failed to find any which substantiate the views of appellant or alter in any degree the arguments in the brief of appellees. No good purpose, therefore, would be accomplished by transcribing here these various cases in detail. None of them is really applicable to the case at bar.

There is nothing unique about the constitution of the State of California. The provision in relation to the taking or damage of property is in the constitutions of many States. This, of course, is familiar to the court. There was brought to our attention a case from Mississippi holding eminent domain to be unnecessary by one railway company against another under the constitutional provision that property can-

not "be taken or damaged for public use except on due compensation first made," and where the Supreme Court of that State says that a railroad company does not own the streets along which its tracks are laid.

> "The only right it can acquire in the streets of a municipality is the right to locate its tracks along or across them subject to the right of the public to continue the free use thereof for traveling, and to the right of the municipal authorities to grant similar easements therein."
>
> *Mississippi Central R. R. Co. vs. Hattiesburg Traction Co.*, 67 Southern, 897.

It is respectfully submitted that the judgment should be affirmed.

HIRAM W. JOHNSON,
GEORGE LULL,
City Attorney.
JOHN T. DAILEY,
Assistant City Attorney,
Attorneys for Appellees

WASHINGTON, March 26, 1919.

UNITED RAILROADS OF SAN FRANCISCO *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 282. Argued March 25, 1919.—Decided April 21, 1919.

A general law, in force when a street railroad franchise was granted by a city, provided that in no case must two railroad corporations occupy and use the same street for more than five blocks; and the franchise ordinance, referring to the law, expressed a like limitation on the power of the board of supervisors, as to the streets covered by the franchise. *Held*, that the limitation was not intended to affect the city when constructing a street railroad of its own under a later amendment of the law and of the state constitution. P. 519.

Held, further, that the grantee took the risk of this judicial interpretation of its franchise and of the city's railroad being run in the same streets on either side of its own, and that any damage inevitably resulting was not a taking of its property requiring resort to eminent domain. P. 520.

Semble, that the damage referred to in the California Constitution of 1879, Art. I, § 14, requiring compensation before private property is taken or damaged for public use, is such as results from conduct that would be tortious unless under eminent domain proceedings or some law authorizing it on condition that damages be paid. P. 521.

The plaintiff having failed to establish its right to enjoin the construction of the city's railroad alongside its own, as a violation of franchise rights and taking of property, and the road having been built *pendente lite*, and the right to recover for any damage due to track-crossings, manner of operation, etc., being doubtful, non-equitable in character and dependent on the taking of new evidence—*Held*, that a decree dismissing the bill should be affirmed, without prejudice to further proceedings to recover any damage to which plaintiff might be entitled. *Id.*

The charter provision requiring the City of San Francisco to consider offers for the sale of existing public utilities before constructing new ones affords no ground for a street railroad company to oppose construction of a municipal road alongside its tracks, when such company, in common with others, had received from the board of supervisors a general solicitation for such offers as to any existing street railway. P. 522.

239 Fed. Rep. 987, affirmed.

THE case is stated in the opinion.

Mr. Garret W. McEnerney, with whom *Mr. William M. Abbott*, *Mr. William M. Cannon* and *Mr. Andrew F. Burke* were on the briefs, for appellant.

Mr. Hiram W. Johnson, with whom *Mr. George Lull* and *Mr. John J. Dailey* were on the briefs, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellant to prevent the construction of a municipal street railway on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double track, for more than five blocks, and also to prevent the inci-

dental cutting of the plaintiff's tracks. The appellant claims the right by grant and contract to forbid the proposed action and relies upon the Constitution of the United States, upon the state constitution which provides that private property shall not be taken or damaged for public use without just compensation having first been made, and upon Article XII, § 2 of the charter of the city, requiring it to consider offers for the sale of existing public utilities before constructing new ones. The answer denies that damage to the plaintiff will ensue from the new tracks and denies as matter of law that the plaintiff has the contract or property rights alleged. On application for a preliminary injunction the District Court held that the plaintiff had failed to make out a case for it, and denied it, intimating an opinion against the plaintiff upon the matter of law involved. It then entered what is called a final decree, denying all relief to the plaintiff with costs to the defendant. 239 Fed. Rep. 987. The present appeal is from that decree.

The franchise of the plaintiff to maintain its two tracks on Market street was granted to its predecessor in title in September, 1879. At that time by § 499 of the Civil Code of California, "two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks." The existence of this general law is the first ground relied upon for the assertion of exclusive rights in the street by the plaintiff. The other ground is the order of the Board of Supervisors of San Francisco granting the franchise, and especially § 5 which is as follows: "It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and

conditions specified in the 499th section of the civil code of this State. This section shall apply to persons and companies, as well as corporations." We agree with the District Court that these sections did not give to the plaintiff the right it claims.

The section of the Code would seem to be a limitation of the powers conferred upon the Board of Supervisors by that and the adjoining sections, not a contract by the State, or an authority to the Board to contract, against a larger use of the streets. It most naturally is read as merely a general law declaring the present legislative policy of the State. *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, 292; *Williams* v. *Wingo*, 177 U. S. 601; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 387; *San Jose-Los Gatos Interurban Ry. Co.* v. *San Jose Ry. Co.*, 156 Fed. Rep. 455, 458. But however this may be neither that section nor § 5 of the order granting the franchise purports in terms to prevent the city from itself establishing a parallel road. If it be true, as the plaintiff argues, that the grant or contract in § 5 of the order means what the statute means and is to be construed by that, we have suggested what seems to us the natural construction of the act. But in any event it is decided by *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, that a covenant by a city not to grant to any other person or corporation a privilege similar to that granted to the covenantee does not restrict the city from itself exercising similar power; and it is assumed in that case, that the principle already is established as to legislative grants. 200 U. S. 34. That is the assumption also of an amendment of § 499 by an Act of April 24, 1911. [Stats. 1911, c. 580.] The city now is given power to establish and operate transportation service by the amendment of § 499 just mentioned and by the constitution of the State. Article, XI, § 19. Amendment approved October 10, 1911. The plaintiff took the risk of the

judicial interpretation of its franchise and of this possible event. *Madera Water Works* v. *Madera*, 228 U. S. 454. Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort to eminent domain.

We understand that the municipal road now has been built, and the question is whether to retain the bill for a claim of damages. But as that would require new evidence and practically would present a new case, and as further, with such light as we now have, the right to damages seems at least doubtful, we deem it sufficient if the rights of the plaintiff, if any, in that regard, are reserved. The question is raised pointedly by Article I, § 14, of the Constitution of 1879. That provides that "private property shall not be taken or damaged for public use without just compensation having first been made," &c. The plaintiff seems to argue that this section entitles it to preliminary compensation for any considerable pecuniary detriment that the city may inflict by the establishment of the new road, however lawfully it may act. Courts and judges have differed widely in their interpretation of this class of provisions in statutes of different sorts; but we should suppose, until otherwise instructed by the Supreme Court of the State, that the damage referred to in this section of the state constitution in the main would be damage resulting from conduct that, like taking, would be tortious unless in proceedings under eminent domain or some law authorizing it on condition that damages be paid.

As to crossing the plaintiff's tracks we are inclined to agree with the District Court that the plaintiff's franchise must be understood to be subject to this incident and that a taking by eminent domain was not necessary. *Market Street Ry. Co.* v. *Central Ry. Co.*, 51 California,

583. *Consolidated Traction Co.* v. *South Orange & Maplewood Traction Co.*, 56 N. J. Eq. 569, 574, *et seq.* 3 Dillon, Municipal Corporations, 5th ed., § 1241, p. 1983. If we are wrong and if the crossings or the manner of operating the parallel tracks should give or has given rise to any claim, the decree will be without prejudice to such claim. We assume in accordance with the plaintiff's evidence and argument that the damage may be considerable and we think it just to leave open whatever can be left open, but at present we cannot say that the loss is or will be of such a character that it must be paid for, and we are satisfied that it is not such as to call for equitable relief.

A general solicitation of offers for sale to the city of any existing street railway in San Francisco was passed by the Board of Supervisors and was ordered to be sent and was sent to the plaintiff, among others. We agree with the District Court that Article XII, § 2 of the City Charter does not better the plaintiff's case.

Decree affirmed without prejudice to further proceedings to recover any damages to which the plaintiff may be entitled.